UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOSE M. SANTANA-PENA
United States Air Force

ACM 37931

02 May 2013

Sentence adjudged 24 February 2011 by GCM convened at Ellsworth Air Force Base, South Dakota. Military Judge: Scott E. Harding.

Approved sentence: Bad-conduct discharge, confinement for 2 years, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Daniel J. Breen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a general court-martial composed of officer members, the appellant pled guilty to wrongfully using Oxycodone, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, he was convicted of wrongfully distributing both Percocet and Diazepam and committing perjury, in violation of Articles 112a and 131, UCMJ, 10 U.S.C. §§ 912a, 931.[1] The panel sentenced the appellant to a bad-conduct discharge,

[1] The appellant was acquitted of wrongfully distributing Vicodin, Xanax and Stanozolol.

confinement for two years, and forfeiture of all pay and allowances. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends the evidence is factually and legally insufficient to sustain his conviction for wrongfully distributing drugs and committing perjury. He also claims the Staff Judge Advocate's Recommendation improperly failed to address the defense's allegations of legal error. Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant claims his sentence to a bad-conduct discharge and two years of confinement is inappropriately severe. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Factual and Legal Sufficiency

The appellant argues the evidence is factually and legally insufficient to sustain his conviction for distributing Percocet and Diazepam because those convictions are based almost entirely on the unbelievable testimony of a single witness. We review issues of legal and factual sufficiency de novo. *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002).

The test for factual sufficiency is "whether, after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, [we are] convinced of the [appellant]'s guilt beyond a reasonable doubt." *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). In conducting this unique appellate role, we take "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt" to "make [our] own independent determination as to whether the evidence constitutes proof of each required element beyond a reasonable doubt." *Washington*, 57 M.J. at 399.

"The test for legal sufficiency of the evidence is 'whether, considering the evidence in the light most favorable to the prosecution, a reasonable factfinder could have found all the essential elements beyond a reasonable doubt.'" *United States v. Humpherys*, 57 M.J. 83, 94 (C.A.A.F 2002) (quoting *Turner*, 25 M.J. at 324). "[I]n resolving questions of legal sufficiency, we are bound to draw every reasonable inference from the evidence of record in favor of the prosecution." *United States v. Barner*, 56 M.J. 131, 134 (C.A.A.F. 2001). Our assessment of legal and factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Senior Airman (SrA) JK met the appellant in May 2009 when they were co-workers at the base clinic. For a short time period in June 2009, they had a sexual relationship. Also in June 2009, SrA JK met with agents from the Air Force Office of Special Investigations (AFOSI) as part of a climate assessment for the clinic. After those

agents began asking her questions about the appellant, she agreed to work with AFOSI by observing the appellant and providing the agents with information about his activities.

On 27 August 2009, after learning SrA JK had injured her ankle, the appellant offered to give her some pain medication. She told him she was going to the doctor later that day, and he asked her to let him know if she received any medication from that visit. SrA JK contacted the AFOSI agents, who advised her to accept the appellant's offer if he made it again. Later that day, SrA JK lied to the appellant by telling him the doctor had not prescribed her any pain medication. After the appellant offered to give her some Percocet, SrA JK met with AFOSI agents, who searched both her and her car and then directed her to drive a certain route to the appellant's dormitory. After SrA JK arrived and parked, the appellant came downstairs with two pills and handed them to her. The AFOSI agents had watched the two from a distance and photographed the appellant approaching her truck, leaning into it for 2-3 minutes and then returning to his dormitory. SrA JK provided the pills to the AFOSI agents, and subsequent testing revealed they were Percocet.

A second transaction occurred on 6 October 2009. While SrA JK was using the appellant's computer in his dormitory room, the appellant asked if she could hold onto some pills for him. She initially said no and then texted an AFOSI agent, who advised her to agree to his request if he made it again. A few minutes later, the appellant asked again and this time she agreed. The appellant put several pills into a small container, which SrA JK then gave to AFOSI. These pills tested positive for Diazepam.

In March 2010, the appellant testified under oath at the Article 32, UCMJ, 10 U.S.C. § 832, investigation in the case of *United States v. Senior Airman Vinicius Santana*. This Airman was facing charges that included conspiring with the appellant to distribute steroids and prescription drugs. Prior to his testimony, the appellant was given testimonial immunity by the general court-martial convening authority, meaning the Government could not use against him any of his testimony or information he provided during his pretrial interviews with the prosecution. After being placed under oath, the appellant denied having any knowledge about the illicit distribution of prescription medication. He also denied ever giving SrA JK any prescription medication.

At the appellant's court-martial, the defense aggressively cross-examined SrA JK, accusing her of lying during her testimony and having a motive to seek revenge on the appellant. She admitted being surprised to learn the appellant was married and also had a girlfriend at the same time he was involved in a sexual relationship with her. She also described an incident where the appellant's jealous girlfriend physically assaulted her in an effort to stop her contact with the appellant. This happened two days before the August 2009 drug transaction, and the defense theory was that SrA JK, angry at the appellant and his girlfriend, took two of her prescribed Percocet pills, planted them on herself, and then told AFOSI the appellant had given them to her. For the October 2009

incident, the defense theory was that SrA JK found Diazepam pills in the bathroom of a friend and again framed the appellant by telling AFOSI that he had given her the pills to hold for him. The defense also pointed out to the court members that AFOSI never put a wire on SrA JK to capture the incriminating conversations and the agents never actually saw any transfer of items between the appellant and SrA JK.

After seeing her in court and hearing her testimony, the panel clearly found SrA JK credible.[2] Having weighed the evidence in the record of trial and making allowances for not having personally observed SrA JK's testimony, we are convinced beyond a reasonable doubt that the appellant is guilty of distributing Percocet and Diazepam to SrA JK on two occasions and then lying about it during an Article 32, UCMJ, investigation. Furthermore, having observed the evidence in a light most favorable to the prosecution, we find a reasonable factfinder could have found all the essential elements beyond a reasonable doubt and, therefore, the evidence is legally sufficient to sustain the appellant's convictions.

Staff Judge Advocate Recommendation

On 5 May 2011, the appellant submitted clemency matters to the convening authority, including a three-page memorandum from the appellant's defense counsel. In this memorandum, the defense counsel raised several issues, which the appellant now couches as "legal errors." Specifically, the defense counsel pointed out the evidentiary deficiencies in the Government's case and the problems with SrA JK's credibility. The defense counsel also argued that the Government had not met its burden of proof and the adjudged sentence was inappropriately severe. The defense counsel's submission asked the convening authority to consider these issues and grant the appellant clemency by only approving six months of his sentence to confinement.

The staff judge advocate subsequently prepared an Addendum to his Staff Judge Advocate Recommendation, noting the appellant was asking for a reduction in his confinement to six months. Stating he had reviewed the clemency submission, the staff judge advocate concluded "I find the adjudged sentence appropriate for the crimes for which he was convicted" and recommended the convening authority approve the adjudged sentence. He also stated "the defense has not alleged any errors." After receiving the defense clemency submission and the Staff Judge Advocate's Recommendation and Addendum, the convening authority denied the appellant's clemency request and approved the findings and sentence as adjudged. The appellant now contends the staff judge advocate violated Rule for Courts-Martial 1106(d) by failing to address the defense's allegations of legal error.

[2] The panel acquitted the appellant of the other drug charges that rested on the testimony of other witnesses.

We review alleged errors in post-trial processing de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004). When the post-trial recommendation to the convening authority is prepared by a staff judge advocate:

> [T]he staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal error is not required. R.C.M. 1106(d)(4).

Unlike his role in clemency, the convening authority's role relative to defense claims of legal error "is less pivotal to an accused's ultimate interests." *United States v. Hamilton*, 47 M.J. 32, 35 (C.A.A.F. 1997). Although a convening authority has the power to remedy an accused's claim of legal error (and is encouraged to act in the interest of fairness to the accused and efficiency of the system), he is not required to do so. *Id.* Defective advice by a staff judge advocate about a claim of legal error that leads a convening authority to not provide relief can be corrected through appellate litigation of the claimed error. *Id.* at 35-36. Accordingly, it is appropriate for an appellate court to look for any prejudice that may have flowed from misadvice about a defense claim of legal error. *United States v. Welker*, 44 M.J. 85, 89 (C.A.A.F. 1996). An appellate finding that those alleged errors have no merit precludes a finding that the staff judge advocate's advice prejudiced the appellant. *Hamilton*, 47 M.J. at 36.

Here, we disagree with the appellant's contention that his defense counsel raised "legal issues" in the clemency submission. The defense submission revolved around the claim that the appellant's sentence should be reduced because the evidence presented at his trial came from an untrustworthy Airman and because he was only convicted of distributing four pills, using one pill and perjury. Under the circumstances here, we hold that the appellant's clemency submission cannot reasonably be read to raise legal issues, and certainly not the type of issues that would require legal advice before the convening authority could make an intelligent decision in the clemency phase. *Welker*, 44 M.J. at 88-89. Additionally, the staff judge advocate advised the convening authority that, after reviewing the clemency submission, he still found the adjudged sentence to be appropriate.

Furthermore, to the extent the clemency submission does constitute a claim of legal error, we have evaluated those same claims as part of his appeal and found them to be without merit. Given that, any misadvice by the staff judge advocate did not prejudice the appellant. *Id.*

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). Our determination of sentence appropriateness under Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires us to analyze the record as a whole to ensure that justice is done and that the appellant receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses as well as the character of the offender. *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 we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant faced a maximum punishment that included a dishonorable discharge and confinement for 35 years. He argues his sentence to a bad-conduct discharge and two years of confinement is inappropriately severe given the relatively minor nature of his offenses. After carefully considering the entire record of trial, the nature and seriousness of these offenses, the matters presented by the appellant in extenuation and mitigation, and the appellant's military service (including his extensive disciplinary record), we find the sentence to be appropriate for this offender and his offenses. *Baier*, 60 M.J. at 384-85; *Healy*, 26 M.J. at 395; *Snelling* 14 M.J. at 268.

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[3] 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

STEVEN LUCAS
Clerk of the Court

[3] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)). *See also United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).