UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SHERI J. SORG
United States Air Force

ACM 35001

27 September 2002

Sentence adjudged 14 December 2001 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Mary Boone.

Approved sentence: Bad-conduct discharge, confinement for 30 months, forfeitures of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Maria A. Fried.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lori M. Jemison (legal intern).

Before

BRESLIN, STONE, and VAN ORSDOL
Appellate Military Judges

PER CURIAM:

A general court-martial convicted appellant, in accordance with her pleas, of absence without leave (AWOL), possession of marijuana, use of Ketamine and lysergic acid diethylamide (LSD), and use and possession of 3,4-methylenedioxymethamphetamine (ecstasy), in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 886, 912a.

Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant argues that her approved sentence is inappropriately severe and asks this Court to reassess her sentence. Finding no merit in the appellant's argument, we affirm.

I. Facts

The appellant married Airman Basic (AB) Joshua Sorg in December 1998. They began using drugs together shortly before their separation in February or March of 2000. After their separation, the appellant stopped for a period of time, but then resumed and actually expanded her drug involvement. Most of the appellant's drug activities occurred at her off-base residence. On 19 June 2001, local law enforcement officials searched the appellant's residence. The following day, distressed by the raid on her home, the appellant failed to report to her place of duty as required and remained absent until the Air Force Office of Special Investigations apprehended her on 21 July 2001.

At trial the appellant pled guilty to all the charges and specifications. A panel of officers sentenced her to a bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority granted clemency and reduced the confinement to 30 months.

The appellant's husband was tried at a general court-martial six months prior to the appellant. He pled guilty to nine specifications of use, possession, and distribution of controlled substances over a seven-month period. A military judge sitting alone sentenced him to a bad-conduct discharge, confinement for 54 months, forfeiture of all pay and allowances, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority reduced his confinement to 27 months.

II. Law

"Congress has vested responsibility for determining sentence appropriateness in the Courts of Criminal Appeals." *United States v. Durant*, 55 M.J. 258, 260 (2001). This Court has a duty to affirm only so much 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), 10 U.S.C. § 866(c). Our review of the appropriateness of a sentence is highly discretionary. *United States v. Lacy*, 50 M.J. 286, 287 (1999). We use "the experience distilled from years of practice in military law to determine whether, in light of the facts surrounding [the] accused's delict, [her] sentence was appropriate." *Id*. at 288 (quoting *United States v. Judd*, 28 C.M.R. 388, 394 (C.M.A. 1960) (Ferguson, J., concurring in the result)).

We are required to "engage in sentence comparison with specific cases . . . in those rare instances in which sentence appropriateness can be fairly determined only by reference to disparate sentences adjudged in closely related cases." *Lacy*, 50 M.J. at 288 (quoting *United States v. Ballard*, 20 M.J. 282, 283 (C.M.A. 1985)). When we engage in sentence comparison, we initially determine if the cases are closely related, and if so, we then determine if the sentences are highly disparate. The appellant bears the burden of demonstrating that the referenced cases are closely related and highly disparate. *Lacy*, 50

M.J. at 288. If the appellant meets this burden, the burden shifts to the government to show that there is a rational basis for the differences. *See United States v. Sothen*, 54 M.J. 294, 296 (2001); *Lacy*, 50 M.J. at 288.

III. Discussion

The appellant did not meet her burden. First and foremost, there is no evidence that the marijuana possession, Ketamine use, ecstasy distribution, or absence without leave involved the husband in any way. There is a partial overlap in two of the five drug offenses, but this overlap does not make the appellant's case closely related to that of her husband.

The area of overlap involves the allegations of use of LSD and ecstasy. Just prior to the couple's separation in March or April of 2000, the appellant and her husband jointly used LSD on two occasions and ecstasy on at least one. On the other hand, in February or March of 2001, a year after their separation, the appellant told a confidential informant that she was using LSD or ecstasy "almost every weekend." Thus, the appellant engaged in an independent course of conduct vis-à-vis LSD and ecstasy use that was not closely related in time, quantity, or location to her prior use with her husband.

Even if we assume that the cases of the appellant and her husband are closely related, the appellant failed to meet her burden of showing the sentences are highly disparate. The additional three months of confinement the appellant received is not a substantial disparity. Based upon our experience, the appellant's sentence did not exceed the relative uniformity of cases involving similar circumstances. We further note that her approved sentence of 30 months is significantly less than the maximum punishment of 33 years of confinement.

Finally, we find that there are cogent reasons for this minor difference in the sentences. The appellant aggravated her drug use by going AWOL for a period exceeding 30 days. Substantial resources were devoted to locate and apprehend her. It also is appropriate to consider her military character, *United States v. Commander*, 39 M.J. 972 (A.F.C.M.R. 1994), which is reflected in a letter of reprimand and a letter of counseling indicating she had difficulty showing up to work on time. We have no evidence of past disciplinary actions taken against the appellant's husband.

Having considered all the circumstances of appellant's offenses in light of her military record, we find the sentence approved by the convening authority to be appropriate. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982).

The approved findings and sentence are correct in law and fact, and no error prejudicial to the appellant's substantial rights occurred. Article 66(c), UCMJ; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator