UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MATTHEW L. TENNEY
United States Air Force

ACM S30817

17 May 2006

Sentence adjudged 13 December 2004 by SPCM convened at Spangdahlem Air Base, Germany. Military Judge: Adam Oler (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 320 days.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Andrew S. Williams, Major N. Anniece Barber, and Captain Kimberly A. Quedensley.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

ORR, JOHNSON, and JACOBSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of wrongful use of mushrooms containing psilocybin, wrongful use of marijuana on divers occasions, possession of marijuana, and breaking restriction on divers occasions, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. Contrary to his pleas, he was found guilty of wrongfully communicating a threat to injure SMD, in violation of Article 134, UCMJ. The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge and confinement for 320 days. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asks that we find his sentence inappropriately severe and asserts that the evidence supporting his conviction for communicating a threat is legally and factually insufficient.[1] We find both assignments of error to be without merit and affirm.

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[1] The second assignment of error, asserting factual and legal insufficiency, was filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

This Court has the authority to review sentences pursuant to Article 66(c), UCMJ, 10 U.S.C. § 866(c), and to reduce or modify sentences we find inappropriately severe. Generally, we make this determination in light of the character of the offender and the seriousness of his offense. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We may also take into account disparities between sentences adjudged for similar offenses. *United States v. Wacha*, 55 M.J. 266, 267 (C.A.A.F. 2001). Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise of clemency. *United States v. Lacy*, 50 M.J. 286, 287. *See also United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). After carefully examining the submissions of counsel and taking into account all the facts and circumstances surrounding the crimes of which the appellant was convicted, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268.

We now turn to the appellant's second assignment of error. The test for legal sufficiency is whether, considering the evidence in the light most favorable to the government, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *United States v. Quintanilla*, 56 M.J. 37, 82 (C.A.A.F. 2001); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). 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 ourselves convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325. After carefully reviewing the record, we conclude that there is sufficient, competent evidence in the record of trial to support the court's findings. The testimony of SMD regarding the threatening phone call was credible and compelling. The military judge's special findings, entered into the record sua sponte in accordance with Rule for Courts-Martial 918(b), are exceptionally helpful, given that the judge was in a position to directly observe the witness during his testimony. Thus, we are convinced of the appellant's guilt beyond a reasonable doubt. *See Turner*, 25 M.J. at 324-25; Article 66(c), UCMJ.

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator