UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic CHRISTOPHER J. ARBELLE
United States Air Force

ACM 37703

28 August 2012

Sentence adjudged 28 April 2010 by GCM convened at Holloman Air Force Base, New Mexico. Military Judge: Jeffrey A. Ferguson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 24 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; Major Michael S. Kerr; and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; Major Roberto Ramirez; and Gerald R. Bruce, Esquire.

Before

ROAN, WEISS, and CHERRY
Appellate Military Judges

PER CURIAM:

The appellant was tried by a general court-martial composed of a military judge sitting alone and found guilty of one specification each of conspiracy to steal a Pontiac Firebird, conspiracy to steal four automobile tires, larceny of a Pontiac Firebird, larceny of four automobile tires, wrongful appropriation of a computer monitor, attempting to steal a Volkswagen Jetta, and wrongful appropriation of an automobile battery, in

violation of Articles 80, 81 and 121, UCMJ, 10 U.S.C. §§ 880, 881, 921.[*] The military judge sentenced the appellant to a bad-conduct discharge, confinement for 24 months, and forfeitures of all pay and allowances. On appeal, the appellant asserts two issues for this Court: (1) that his convictions of conspiring to steal a Pontiac Firebird and stealing a Pontiac Firebird are legally and factually insufficient because the evidence does not support the value of the property being greater than $500; and (2) that his sentence is inappropriately severe given the disparity between his sentence and his co-conspirator's sentence. We disagree and, finding no error, we affirm.

Background

At the time of his trial, the appellant was 21 years old with no dependents. He had two years and two months of active service. The appellant conspired with a fellow airman, Airman Basic (AB) KH, to steal a Pontiac Firebird and four automobile tires. To carry out the offenses, AB KH distracted the auto hobby shop clerk while the appellant stole the automobile and tires. The automobile tires were installed on AB KH's automobile at a nearby Walmart department store. The Firebird was abandoned at a nearby automobile repair shop. In addition to stealing the Pontiac Firebird and tires, the appellant attempted to steal a Volkswagen Jetta and wrongfully appropriated an automobile battery valued at less than $500.

Legal and Factual Sufficiency

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 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 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 *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987)). "[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) (citation omitted). Our assessment of legal sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

The test for factual sufficiency is "'whether, after weighing the evidence . . . and making allowances for not having personally observed the witnesses,' [we ourselves are] 'convinced of the [appellant's] guilt beyond a reasonable doubt.'" *United States v. Reed*,

[*] The appellant was found not guilty of conspiracy to steal a Volkswagen Jetta and larceny of a Kodak digital camera, in violation of Articles 81 and 121, UCMJ, 10 USC §§ 881, 921.

54 M.J. 37, 41 (C.A.A.F. 2000) (quoting *Turner*, 25 M.J. at 325). 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.

We find the evidence legally and factually sufficient to support the appellant's conviction of stealing a Pontiac Firebird automobile of a value of more than $500. The owner testified that he paid $5,000 for the automobile and that its value was between $2,500 and $2,600 based on various used car resources and the automobile's condition at the time it was stolen. Having taken a fresh, impartial look at the evidence and making allowances for not having observed the witnesses ourselves, we are convinced of the appellant's guilt beyond a reasonable doubt.

Sentence Appropriateness

We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (citations omitted); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007), *aff'd*, 65 M.J. 310 (C.A.A.F. 2007). 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); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making a sentence appropriateness determination, we are required to examine sentences of closely related cases and permitted, but not required, to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288. "Cases are 'closely related' where, for example, they involve 'coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.'" *United States v. Anderson*, 67 M.J. 703, 706 (A.F. Ct. Crim. App. 2009) (quoting *Lacy*, 50 M.J. at 288). "Merely because a case involves similar charges brought under the same section of the UCMJ does not mean it is 'closely related' within the meaning of this Court's mandate to determine sentence appropriateness." *Rangel*, 64 M.J. at 686.

Based on the record of trial, we are convinced the appellant's case is not closely related to AB KH's. First, the appellant and AB KH were convicted of different crimes. Though the appellant and AB KH were found guilty of conspiracy to steal a Pontiac Firebird, conspiracy to steal 4 automobile tires, larceny of a Pontiac Firebird, larceny of

4 automobile tires, attempted theft of a Volkswagen Jetta, and conspiracy to steal Volkswagen Jetta, the appellant was additionally found guilty of wrongful appropriation of a Government computer monitor and wrongful appropriation of an automobile battery. Second, the appellant was the ring leader in the commission of the offenses for which he was convicted. Third, the record of trial contains multiple adverse administrative actions taken against the appellant including five letters of reprimand. Fourth, AB KH pled guilty to all charges and specifications at his court-martial. These differences between the convictions of the appellant and AB KH show that the cases are not closely related and that, if they are, the Government has shown a rational basis for the disparity. The differences are enough to distinguish the appellant's case from that of his co-conspirator's. We find that the appellant has not met his burden to show that the cases are closely related and therefore we find that the appellant's assignment of error is without merit.

Appellate Delay

Although not raised by the appellant, we review de novo claims whether an appellant has been denied the due process right to a speedy trial. *United States v. Moreno*, 63 M.J. 129, 135 (C.A.A.F. 2006). This case was docketed with our Court on 2 August 2010. The overall delay between the docketing of the case with this Court and completion of our review is in excess of 540 days and therefore facially unreasonable.

Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530-32 (1972): (1) then length of the delay, (2) the reason for the delay, (3) the appellant's assertion of the right to timely review and appeal, and (4) prejudice. *Moreno*, 63 M.J. at 135-36. When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances of this case as well as the entire record, we conclude that any denial of the appellant's right to speedy appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

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,

10 U.S.C. § 866(c); *Reed*, 54 M.J. at 41. Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court