UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class BRETT T. BANWELL
United States Air Force

ACM S31585 (f rev)

27 April 2010

Sentence adjudged 30 October 2008 by SPCM convened at Laughlin Air Force Base, Texas. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $898.00 pay per month for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, and Captain Phillip T. Korman.

Appellate Counsel for the United States: Colonel Douglas P. Cordova and Lieutenant Colonel Jeremy S. Weber.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A military judge convicted the appellant in accordance with his pleas of one specification of willful dereliction of duty by consuming alcohol while under the legal drinking age and one specification of divers wrongful use of cocaine, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The special court-martial composed of officer members sentenced the appellant to a bad-conduct discharge, confinement for eight months, forfeiture of $898 pay per month for 12 months, and reduction to the grade of E-1. After remand for a corrected action and promulgating

order, the convening authority approved the bad-conduct discharge, adjudged forfeitures, reduction in grade, and confinement for three months.

The remaining issues on appeal are (1) whether the military judge should have sua sponte disqualified a court-martial member and (2) whether the military judge committed plain error by allowing sentencing testimony concerning the appellant's drug use during the charged period that was not mentioned by the appellant during the plea inquiry.[1] Finding no prejudicial error, we affirm.

Background

In March 2008, less than a year after entering active duty, the appellant provided a urine specimen that tested positive for cocaine; in August, five months later, he again tested positive for cocaine. Charged with divers use of cocaine between March and August 2008, the appellant admitted two uses during the plea inquiry – one in March and one in August. He stated that on each occasion he purchased the cocaine from a civilian supplier and used the cocaine in his vehicle. During sentencing, a fellow airman and drug user testified under a grant of immunity that the appellant admitted using cocaine on multiple occasions during the charged period and that he usually used on Wednesdays and Fridays since those days appeared safest for urinalysis testing.

Denial of Challenge for Cause

The appellant elected trial by officer members. During voir dire, Lieutenant Colonel (Lt Col) JC stated that two of his older brothers had drug problems in the past but both had been rehabilitated and were leading productive lives. He added that he only had vague, general recollections of their drug issues because he is several years younger than them and his parents shielded him from knowledge of the specifics. In response to questioning by the military judge, Lt Col JC stated that he did not think this would cause him to give more or less weight to the government's case. Regarding the defense's case, the transcript records this response: "I don't it would affect my impartiality." He then told the military judge without equivocation that he could set this aside and decide the case solely on the evidence. Neither trial counsel nor defense counsel took the opportunity to ask additional questions, and neither challenged Lt Col JC.

Despite entering no challenge at trial, the appellant now claims that the military judge should have sua sponte excused Lt Col JC. The appellant's weak attempt to distort the obvious typographical error in the transcript of Lt Col JC's response quoted above into an admission of actual bias falls flat. Both logic and context clearly show that Lt Col

[1] The two issues were raised in the appellant's initial appeal before this Court. After this case returned with the corrected action and promulgating order, the appellant's counsel submitted a merits brief. However, because this Court had not addressed these two issues, we will address them in this opinion.

JC's answer disclaimed any bias.[2] Nevertheless, the appellant now asserts both actual and implied bias. We find neither.

A military judge may remove a member sua sponte in the interest of justice for either actual or implied bias. Rule for Courts-Martial (R.C.M.) 912(f)(4). We review a military judge's decisions on actual bias for abuse of discretion; we review implied bias with less deference than abuse of discretion by using an objective standard of public perception. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002). A member shall be excused for cause whenever it appears that the member "[s]hould not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." R.C.M. 912(f)(1)(N). This rule applies to both implied and actual bias. *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

With implied bias, we focus on the perception or appearance of fairness of the military justice system as viewed through the eyes of the public. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998); *United States v. Dale*, 42 M.J. 384, 386 (C.A.A.F. 1995). Simply stated, "[i]mplied bias exists 'when most people in the same position would be prejudiced.'" *Daulton*, 45 M.J. at 217 (quoting *United States v. Smart*, 21 M.J. 15, 20 (C.M.A. 1985)). For both types of challenges for cause, military judges must apply the liberal grant mandate which recognizes the unique nature of the court member selection process. *Downing*, 56 M.J. at 422.

Lt Col JC's responses show no actual bias. Here, the brothers involved in drug use were older than Lt Col JC, his parents shielded him from the specifics, he has only a vague recollection of the circumstances, and both brothers are rehabilitated and lead productive lives. These facts clearly support Lt Col JC's disclaimer of bias.

Likewise, his responses do not taint public perception of the trial's fairness such that he should have been removed for implied bias. Apparently, as shown by the lack of any challenge or follow-up questions, even the appellant and his counsel did not perceive any bias at trial. Contrary to the appellant's assertion that the military judge "sat mute in the face of an admission by a member that he was not impartial," the record reveals no such admission and raises no sua sponte duty. After seeing and hearing Lt Col JC, the military judge, like the appellant and his counsel, obviously concluded he was qualified to serve. We agree.

Testimony in Sentencing Concerning Other Drug Use

The appellant asserts plain error in the sentencing testimony of Airman Basic (AB) BP concerning the appellant's admissions to him of continued drug use during the

[2] In affidavits submitted to the Court, both the court reporter and the assistant trial counsel confirm the obvious: Lieutenant Colonel JC actually said, "I don't think it would affect my impartiality."

charged time frame of 17 March 2008 and 19 August 2008. The appellant admitted only two uses during the plea inquiry, one in March near the beginning of the charged period and one in August near the end. AB BP testified in sentencing that the appellant told him in July 2008 that he was still using drugs every Wednesday and Friday, explaining that he chose those days for use because urinalysis testing usually occurs early in the week. The trial defense counsel offered no objection to the testimony.

Failure to object to specific evidence waives the issue absent plain error. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008). Plain error occurs when: (1) there is error; (2) the error is plain or obvious; and (3) the error results in material prejudice to substantial rights. *Id*. (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)). Error is not "plain and obvious" if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened sua sponte. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009). Here, we find no error, plain or otherwise, in the admission of testimony in aggravation concerning the appellant's drug use during the charged time period.

Aggravating evidence includes that which is closely related to the charged offenses in time, type, and/or outcome. *Hardison*, 64 M.J. at 281-82. Aggravation evidence includes that which shows a continuous course of conduct involving similar crimes, the same victims, and similar locations. *Id*. (citing *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990)). Here, the appellant's admissions describe conduct directly related to the charged offense during the charged time period and is clearly proper aggravation evidence that shows the duration and circumstances of the charged offense. *See United States v. Shupe*, 36 M.J. 431 (C.M.A. 1993).

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); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court