**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Senior Airman TODD A. BARGER**
**United States Air Force**

**ACM 36676**

**18 January 2008**

Sentence adjudged 24 January 2006 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge, confinement for 8 months, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Griffin S. Dunham (argued), Lieutenant Colonel Mark R. Strickland, and Major Shannon A. Bennett.

Appellate Counsel for the United States: Major John P. Taitt (argued), Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Kimani R. Eason, and Major Donna S. Rueppell.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges



PER CURIAM:

In accordance with his pleas, the appellant was convicted of three specifications of wrongfully using cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad-conduct discharge, confinement for 8 months, and reduction to E-1.

The appellant raises three issues on appeal. The first issue is whether the military judge committed plain error when he failed to inquire into whether the appellant received a speedy trial with regard to the Charge and its specification after 180 days of non-excludable delay lapsed between preferral and arraignment. The second issue is whether

trial counsel's argument, and the military judge's failure to interrupt it and provide a curative instruction, constitute plain error when trial counsel argued for a bad-conduct discharge by stating, inter alia, "we give honorable characterizations to military members who served 20 years honorably; not 18; not 19 and a half; but 20. He has failed to do that. He's failed to serve 20 honorable years and his conduct warrants bad conduct service characterization as such." The final issue is whether the appellant was afforded the effective assistance of counsel when his counsel (1) unnecessarily stipulated to cocaine use that was subsequent to the latest charged time period and failed to object to a prosecution exhibit corroborating such use; (2) called a witness that testified on cross examination to the appellant's "heavy use" of cocaine on a "daily basis" "for a long stretch" despite the prosecution resting without eliciting any evidence about the appellant's number of uses; and (3) failed to object to trial counsel's argument "we give honorable characterizations to military members who served 20 years honorably, not 18, not 19 and a half, but 20. He has failed to do that. He's failed to serve 20 honorable years and his conduct warrants bad conduct service characterization as such."

*Background*

At the time of trial, the appellant was 41 years old and was assigned to the National Airborne Operations Center as an E-4B ground crew member. The appellant had been on active duty 247 months. He was married and had two children, an 18-year-old son, and a 14-year-old daughter. On 17 Dec 2004, the appellant, then a Master Sergeant, was convicted at an earlier court-martial for use of cocaine based upon a positive urinalysis result, and sentenced to reduction to E-4 and hard labor without confinement for 3 months.

Shortly before his first court-martial, the appellant was selected, on 22 Nov 2004, for a random urinalysis. It came back positive for the metabolite of cocaine, and was the basis for the original charge of this second court-martial. The Charge and Specification were preferred on 29 Dec 2004. Referral occurred on 17 Feb 2005, and a trial date of 3 May 2005 was set by the Chief Trial Judge of the Eastern Circuit with the time from 28 Mar 2005 until the trial date excluded for speedy trial purposes.[1] Thereafter, several delays were granted until the trial occurred on 23 Jan 2006. These delays resulted from a request for discovery of additional evidence, surgery of the appellant, and conflicts in scheduling.[2]

In the meantime, two more positive urinalysis results for the metabolite of cocaine were received.[3] An Additional Charge and a Second Additional Charge were preferred and referred.

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[1] The original trial date was 3 May 2005. All delays in this case were granted by the military judges assigned to the case.

[2] Including conflicts with schedules of the two civilian counsel who were hired by the appellant.

[3] Results were received in Mar 2005 and Jul 2005.

On 8 Sep 2005, the appellant was placed in pretrial confinement. Upon entry into confinement, the appellant was required to provide a urine sample which came back positive for the metabolite of cocaine.[4] Additionally, prior to being placed in pretrial confinement, the appellant provided a sample in Aug 2005 pursuant to command direction and it too was positive and the subject of a Letter of Reprimand, that was admitted in sentencing.

*Speedy Trial*

The appellant requests dismissal of the Charge and its specification because the military judge failed to inquire as to why the government failed to comply with Rule for Courts-Martial (R.C.M.) 707. Specifically, that the accused shall be brought to trial within 120 days after the preferral of charges. R.C.M. 707(a)(1). Preferral for the Charge and its Specification occurred on 29 Dec 2004. All pretrial delays approved by a military judge or the convening authority shall be excluded. R.C.M. 707(c). The military judge engaged in discussions with counsel as to a trial date on 18 Feb 2005 and counsel agreed to an initial trial date of 3 May 2005. The first available judge date was 28 Mar 2005 and pursuant to the detailing letter all time from that date, 28 Mar 2005, was excluded for R.C.M. 707 speedy trial purposes.

A plea of guilty which results in a finding of guilty waives any speedy trial issue as to that offense. R.C.M. 707(e). If the violation of R.C.M. 707 constituted plain error, we may not apply waiver. *United States v. Vendivel*, 37 M.J. 854, 857 (A.F.C.M.R. 1993), *rev'd on other grounds*, 40 M.J. 28 (C.M.A. 1994).

Clearly the appellant waived the issue of speedy trial by his unconditional plea of guilty. We can not consider that waiver if the violation constituted plain error. A discussion of plain error is unwarranted as it is clear from the documents attached to the record that the speedy trial clock was tolled on 28 Mar 2005, at the latest, a mere 89 days after preferral. The record is clear all other delays after that were granted by the military judge. There is no R.C.M. 707, speedy trial, violation.

*Trial Counsel's Argument*

During the government's sentencing argument, counsel argued "He's talked about the 18, 19 years that he served honorably. . . . We give honorable characterizations to military members who served 20 years honorably; not 18; not 19 and a half; but 20. He has failed to do that. He's failed to serve 20 honorable years, and his conduct warrants bad conduct service characterization as such."[5] That part of the argument was

[4] This result is the basis for one of the allegations of ineffective assistance of counsel which will be discussed later in this opinion.

[5] The questionable part of the argument constituted five lines in an eight-page argument.

immediately preceded by the trial counsel making statements including the appellant's conduct as "severe bad conduct," "he deserves to have it characterized as such," that a "bad conduct discharge does that," and "it characterizes his conduct as bad," and by trial counsel referencing the military judge's instruction on a punitive discharge. There was no objection by trial defense counsel.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). The legal test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Whether or not the comments are fair must be resolved when viewed within the entire court-martial. *United States v Gilley,* 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Gilley,* 56 M.J. at 123. Failure to object to improper sentencing argument waives the objection absent plain error. R.C.M. 1001(g). To find plain error, we must be convinced (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998).

The argument of counsel was not improper and was fair when viewed within the entire court-martial. The military judge had no duty to interrupt a fair argument. There was no error, plain or otherwise.

*Ineffective Assistance of Counsel*

Service members have a fundamental right to the effective assistance of counsel at trial by courts-martial. *United States v. Davis*, 60 M.J. 469, 473 (C.A.A.F. 2005) (citing *United States v. Knight*, 53 M.J. 340, 342 (C.A.A.F. 2000)). We analyze claims of ineffective assistance of counsel under the framework established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Counsel are presumed to be competent. It is well established, the appellate court will not second guess the strategic or tactical decisions made at the time of trial by the defense counsel. *United States v. Morgan*, 37 M.J. 407, 410 (C.M.A. 1993). Where there is a lapse in judgment or performance alleged, we ask first whether the conduct of the defense was actually deficient, and, if so, whether that deficiency prejudiced the appellant. *Strickland*, 466 U.S. at 687; *see also United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991). The appellant bears the burden of establishing that his trial defense counsel was ineffective. *United States v. Garcia*, 59 M.J. 447, 450 (C.A.A.F. 2004); *United States v. McConnell*, 55 M.J. 479, 482 (C.A.A.F. 2001).

Reviewing the record of trial, the submissions of counsel, and the oral arguments presented to this Court, we find this issue to be without merit. It is abundantly clear the appellant and his counsel determined the best strategy for attempting to avoid the punitive discharge was to admit addiction to cocaine, a logical explanation for the appellant's continued uses in the face of extreme consequences.

This theme was deftly presented through the testimony of an "addictology" expert and the unsworn statement of the appellant. To try and avoid the testimony including the "heavy use" of cocaine on a "daily basis" "for a long stretch" by the appellant flies in the face of this apparent theme.

As to the complaint that counsel "unnecessarily stipulated to cocaine use that was subsequent to the latest charged time period and failed to object to a prosecution exhibit corroborating such use," it is also without merit on their claim of ineffectiveness of counsel. There are a variety of logical and obvious explanations for defense allowing this information to be presented. First, when negotiating a pretrial agreement, it is generally required that the appellant agree to a reasonable stipulation of fact and such was the case here. Further, it is clear, there could have been a third additional charge thereby subjecting the appellant to 20 years of confinement instead of 15. And finally, this information fits squarely into the defense sentencing theme presented throughout the trial.

The failure to object to trial counsel's argument is a non-issue and the conduct of the counsel was not deficient.

*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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court