UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Cadet JONATHAN S. BELKOWITZ
United States Air Force

ACM 36358

20 December 2006

Sentence adjudged 15 January 2005 by GCM convened at the United States Air Force Academy, Colorado. Military Judge: Kurt D. Schuman (sitting alone).

Approved sentence: Dismissal.

Appellate Counsel for Appellant: Eugene R. Fidell, Esq. (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Christopher S. Morgan, Captain Kimberly A. Quedensley, Captain Anthony D. Ortiz, Marc C. Gann, Esq., and Richard D. Collins, Esq.

Appellate Counsel for the United States: Major Steven R. Kaufman (argued), Colonel Gerald R. Bruce, Colonel Gary F. Spencer, and Lieutenant Colonel Robert V. Combs.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

SCHOLZ, Judge:

The appellant was convicted, contrary to his pleas, of making a false official statement and soliciting another cadet to buy and use illegal steroids in violation of Articles 107 and 134, UCMJ, 10 U.S.C. §§ 907, 934. The appellant was acquitted of the charged offenses of wrongfully importing, using, distributing,

and introducing onto an installation, anabolic steroids in violation of Article 112a, UCMJ, 10 U.S.C. § 912(a). However he was convicted of the lesser included offense of *attempting* to: wrongfully import, use, distribute and introduce onto an installation, anabolic steroids in violation of Article 80, UCMJ, 10 U.S.C. § 880. A military judge, sitting alone as a general court-martial, sentenced the appellant to a dismissal. The convening authority approved the findings and sentence as adjudged.

The appellant asserts five assignments of error before this Court: (1) the equal protection component of Fifth Amendment[1] due process was violated below (and is being violated here) because the military judge and the judges of this Court serve without the protection of a fixed term of office, whereas those in the Army and Coast Guard enjoy such protection by regulation; (2) the evidence is factually insufficient; (3) the appellant was denied a fair trial because the court-martial ran to excessively late hours without good cause; (4) the sentence should be set aside because of improper argument; and (5) the sentence is excessive. We reviewed the record of trial, the appellant's brief, the government's response thereto, and heard oral argument from counsel on issues (1) and (3), above. We conclude that the assignments of error have no merit and we affirm.

Constitutional Due Process

With regard to the appellant's first argument, our brethren on the Navy-Marine Corps Court of Criminal Appeals ruled on this exact issue in *United States* v. *Gaines*, 61 M.J. 689 (N.M. Ct. Crim. App. 2005), *aff'd*, No. 06-127/NA (C.A.A.F. 11 Sep 2006) (Summary Disposition) (unpub. op.). The Navy-Marine Corps Court relied on precedent from our superior court, the Court of Appeals for the Armed Forces[2] and UCMJ Articles 26(a)[3] and 66[4] to hold that the appellant was not denied the equal protection of the law due to him under the due process

[1] U.S. CONST. amend. V.

[2] *See United States v. Hoesing*, 5 M.J. 355, 358 (C.M.A. 1978) ("Congress has never required such uniformity among the services, and it has consistently authorized the Secretary of each armed force to promulgate regulations to meet special needs of his service, as determined by him."); s*ee also United States v. Loving*, 41 M.J. 213, 295-96 (C.A.A.F. 1994), *aff'd*, 517 U.S. 748 (1996) (The differences between Article III courts and military courts do not deprive servicemembers of equal protection under the Fifth Amendment because an appellant is entitled under Article 67a, UCMJ, 10 U.S.C. § 867(a), to seek review by the United States Supreme Court, an Article III court.).

[3] Congress has sanctioned distinctions between the services in authorizing each service secretary to prescribe regulations for the manner in which military judges are detailed. Art. 26(a), UCMJ, 10 U.S.C. § 826(a); *Gaines*, 61 M.J. at 692.

[4] Congress has also sanctioned distinctions between the services in authorizing each Judge Advocate General to establish a Court of Criminal Appeals and to prescribe uniform rules of procedure for their respective Court of Criminal Appeals. Art 66(a) and 66(f), UCMJ, 10 U.S.C. §§ 866(a), 866(f); *Gaines*, 61 M.J. at 692.

clause of the Fifth Amendment to the United States Constitution. *Gaines*, 61 M.J. at 692. We find this well-reasoned holding applies to the case *sub judice*.

Fair Trial

The appellant claims he was denied a fair trial because the court-martial ran to excessively late hours without good cause. We disagree. The appellant argues that the trial judge abused his discretion by permitting the trial proceedings to run too long each day and, in so doing, he failed to be sensitive to the appellant's Jewish faith by allowing the trial to continue into Saturday. The hours for each day of trial were approximately 3 hours on Wednesday, the first day of trial, 8.5 hours on Thursday, 9 hours on Friday, and 9.7 hours on Saturday. There was no objection at trial by either side with regard to the length of the trial days nor did the appellant express his desire to observe the Jewish Sabbath[5], which begins at sundown each Friday evening; however, on the Friday during the appellant's court-martial, at 1744 hours, prior to beginning their cross-examination of the accused, the trial counsel asked the military judge to recess the court for the evening.[6] The defense counsel then asked to be allowed to call their expert witness out of turn, for the expert's convenience. The judge allowed this. The court-martial adjourned at 1840 hours, after the defense's expert testified.

The next morning, on Saturday, the trial counsel told the judge that they would not be ready to address certain matters until Monday at the earliest. The judge ruled that he would not delay the case to give the trial counsel time to sort out these issues, so the trial counsel continued with the cross-examination of the appellant and the trial proceeded, without objection from the appellant. The trial defense counsel asked for a recess at 1803 hours to explain to "our witnesses where we are and what your findings were." The judge's response was "We'll take a recess. You just need to ask. We're in recess." The court reconvened at 1826 hours for sentencing and closed at 2041 hours. Based on these facts, we do not find the military judge abused his discretion when setting the time for each session of trial, as he is required to do pursuant to Rule for Courts-Martial (R.C.M.) 801(a)(1).

[5]The appellant mentioned his religious denomination once during the trial proceedings. In response to trial defense counsel's direct examination question, "Now what kinds of cadet positions did you hold as a duty?", the appellant responded, "I was also—I don't know how to say this, but a representative as a Jewish cadet. There wasn't that many of us. For the squadron I held services for Friday nights and Saturdays mornings sometimes, but I really tried to take as much part as I could in the squadron even though I wasn't there all as much."

[6] The military judge, summarizing a Rule for Courts-Martial 802 session on the record, stated, "Trial counsel has raised an issue with regard to some matters that they feel they need to look into before they commence with their cross-examination. They have asked that we go ahead and break for the evening. Mr. Spinner has indicated that there are some issues with regard to Dr. Di Pasquale; so we talked about it and neither side has any problems with regard to putting off your cross-examination for some time and proceeding with the testimony of Dr. Di Pasquale."

Remaining Issues

We considered the remaining issues raised by the appellant and resolve them adversely to him. The evidence admitted at trial was both legally and factually sufficient to support the appellant's convictions. *United States v. Turner*, 25 M.J. 324, 324-25 (C.M.A. 1987). We do not find that the trial counsel's argument was improper. *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Furthermore, we find that the trial counsel's argument did not materially prejudice the substantial rights of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998). Finally, after carefully examining the submissions of counsel and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

Conclusion

The 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

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator