UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant GREGORY B. BURNEY
United States Air Force

ACM S31601

24 November 2009

Sentence adjudged 19 November 2008 by SPCM convened at Cannon Air Force Base, New Mexico. Military Judge: Stephen R. Woody.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Darrin K. Johns, and Major Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

A special court-martial convicted the appellant in accordance with his conditional plea of one specification alleging wrongful introduction of ecstasy and methamphetamine onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The convening authority approved the sentence adjudged by a panel of officer and enlisted

[1] This case first came before this Court on an Article 62, UCMJ, 10 U.S.C. § 862, appeal of a ruling suppressing the results of the search of the appellant's vehicle by security forces personnel. This Court reversed the military judge and returned the case for trial. *United States v. Burney*, 66 M.J. 701 (A.F. Ct. Crim. App. 2008), *pet. denied*, 67 M.J. 195 (C.A.A.F. 2008). The conditional plea preserved the issue, which, at the time of trial, was still pending review by our superior court.

members, consisting of reduction to E-1, confinement for 30 days, and a bad-conduct discharge. On appeal the appellant challenges: (1) the military judge's denial of a challenge for cause based on a rater-ratee relationship and (2) the appropriateness of the sentence.[2] Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

Upon entering the gate at Cannon Air Force Base, the appellant consented to a random vehicle inspection by security forces personnel who discovered the six pills which form the basis of the charge. Laboratory tests showed the pills contained both ecstasy and methamphetamine. The providence inquiry supports acceptance of the plea to wrongful introduction of both illegal drugs.

Denial of Challenge for Cause

The appellant elected trial by officer and enlisted members. After voir dire, the appellant challenged the senior member, Colonel (Col) ML, on the basis that he was rated by the convening authority and also rated two other panel members, Major (Maj) RW and Senior Master Sergeant (SMSgt) MD. Citing each member's responses as well as the liberal grant mandate, the military judge denied the challenge under both actual and implied bias theories.

We review a military judge's ruling on a challenge based on actual bias for abuse of discretion, while we review challenges based on implied bias with less deference 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." Rule for Courts-Martial 912(f)(1)(N). This rule applies to both implied and actual bias. *United States v. Daulton*, 45 M.J. 212, 216-17 (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)). Military judges must apply the liberal grant mandate, which recognizes the unique nature of the court member selection process, when ruling on challenges for cause. *Downing*, 56 M.J. at 422.

[2] The appellant raises both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (CMA 1982).

The military judge found that neither Col ML, Maj RW, nor SMSgt MD expressed any hesitation in performing their duties as court members or expressing their own views in deliberations. Further, he found that Col ML felt "no pressure whatsoever" based on his being rated by the wing commander who acted as the convening authority. Finally, in making his determination regarding both actual and implied bias of the challenged member, the military judge expressly considered the liberal grant mandate.

The record clearly supports the findings and conclusions of the military judge in denying the challenge for cause. First, the military judge applied the liberal grant mandate in making his determination on both actual and implied bias. Second, the responses of each member show that each could fully perform the duties of a court member regardless of any senior-subordinate relationship, and a senior-subordinate relationship does not per se disqualify a panel member. *United States v. Murphy*, 26 M.J. 454, 456 (C.M.A. 1988). Third, the unequivocal responses of the members objectively allay any concern that the public may somehow perceive the trial as unfair in this regard. Applying the standards described above, we find the military judge did not err in denying the challenge for cause.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). 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 assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *Healy*, 26 M.J. at 395-96.

The appellant asserts that his sentence which includes a bad-conduct discharge is inappropriately severe. However, as the government points out in its brief, the appellant's argument is essentially a renewal of his request for clemency. Having given individualized consideration to this particular appellant, the nature of the offense, the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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; *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