UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEVEN D. CASH
United States Air Force

ACM S31881

09 May 2012

Sentence adjudged 29 September 2010 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Michael J. Coco.

Approved sentence: Bad-conduct discharge, confinement for 100 days, forfeiture of $964.00 pay per month for 12 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Major Anthony D. Ortiz; Captain Thomas Franzinger; and Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant in accordance with his plea of cocaine use, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced him to a bad-conduct discharge, confinement for 6 months, forfeitures of $964.00 pay per month for 12 months, reduction to the grade of E-1, and a reprimand. A pretrial agreement capped confinement at five months, and the convening authority approved the sentence adjudged except for confinement, which he reduced to 100 days as requested by the appellant in clemency. The appellant assigns two errors:

whether trial counsel improperly argued for a bad-conduct discharge and whether the sentence is inappropriately severe.

Sentencing Argument

The appellant made an unsworn statement to the court—in which he highlighted his service, his difficult upbringing, and his medical problems—to request that he not receive a bad-conduct discharge:

> I implore you to take into account my health conditions and the fact that a bad conduct discharge would not only remove me from society as the veteran that I am. Yes, I did drugs, but I am a veteran. I have served my country and I did so proudly, and I believe I deserve respect for that just like any other person who's been in the same environment that I was in.

He emphasized that a bad-conduct discharge would deprive him of veteran's benefits, to include medical care, and stated: "If you do not assess a bad conduct discharge, I will likely be separated administratively after this court-martial . . . ."

The military judge correctly instructed the members that a bad-conduct discharge is a severe punishment that would indeed deprive the appellant of substantially all Veterans Administration benefits and would deny the appellant "other advantages which are enjoyed by one whose discharge characterization indicates *that he has served honorably*." (Emphasis added). He also instructed them that the administrative discharge referenced by the appellant in his unsworn statement was not relevant to their sentencing considerations and that they should not adjudge an excessive sentence in reliance on possible mitigating action by the convening or higher authority. The members had no questions concerning the instructions.

In support of his argument for a bad-conduct discharge, trial counsel contrasted this severe punishment with the discharge of those who have served honorably:

> Now why else is a bad conduct discharge appropriate? An honorable discharge is a privilege. It allows those who've served honorably to get jobs and loans. . . . People who serve every day honorably get the honorable discharge . . . . It's a privilege. Giving him an honorable discharge devalues the service of any member who serves—

Defense counsel objected at this point, stating that the question was not whether to give the appellant an honorable discharge. The military judge ruled:

> Members, I've instructed you what a bad conduct discharge is. You can go back and read that instruction as to what it means. This is counsel's comment on that particular instruction, and if there's any difference

between what they say and what I've instructed you, you must follow my instruction. Overruled.

Trial counsel briefly concluded by arguing that a bad-conduct discharge was appropriate in this case. Defense counsel argued vigorously against a bad-conduct discharge, stressing that the trial counsel wanted the members to "simply turn your back; give him a BCD; cut him loose; no health insurance; no VA benefits; nothing for the rest of his life; because that's what you're doing. That's how you would be repaying somebody who's given as much as he has."

We review sentencing arguments de novo to determine "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). Comments in sentencing argument are not viewed in isolation, but in context: "[T]he argument by a trial counsel must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation but the argument as 'viewed in context.'" *Baer*, 53 M.J. at 238 (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)).

We agree with the appellant that the comment concerning "giving" the appellant an honorable discharge would, if viewed in isolation, be improper. *United States v. Motsinger*, 34 M.J. 255 (C.M.A. 1992) (Blurring the distinction between a punitive discharge and administrative separation is improper.). Viewed in context, however, the comment clearly targets the appellant's unsworn assertion and his counsel's argument that he should not be deprived of the benefits earned as a veteran. Furthermore, it tracks with the military judge's instruction that a bad-conduct discharge would deprive the appellant of benefits provided to those who have served honorably. We addressed a similar argument in *United States v. Greska*, 65 M.J. 835 (A.F. Ct. Crim. App. 2007), where the prosecutor argued that, by adjudging a bad-conduct discharge, the members would send a message that the appellant had "not served honorably." *Id.* at 838. Interpreting the statement in context, we determined that the argument properly commented on the appropriateness of a bad-conduct discharge as punishment and did not suggest that a punitive discharge be used simply to separate the appellant from the Air Force. *Id.* In the present case, both the appellant and his counsel focused their efforts against a bad-conduct discharge on the loss of benefits available to those who had served honorably, and trial counsel countered that argument with a hard-hitting but fair comment on the consequences of the severe punishment of a bad-conduct discharge.

Sentence Appropriateness

The appellant argues that his sentence is inappropriately severe and requests that we not affirm the adjudged and approved bad-conduct discharge. We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and

seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, 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).

While the appellant's deployment history and medical issues are certainly mitigating and appropriate considerations in clemency, these factors do not show that a bad-conduct discharge is an inappropriately severe component of the sentence for the appellant's multiple uses of cocaine purchased from a civilian drug dealer at a cost of $1,000.00 to $2,000.00 per month. The appellant tested positive for cocaine at a level of 104 nanograms per milliliter after a Government vehicle accident on 21 March 2010; a second urinalysis taken on 2 April 2010 was positive for cocaine at a level of 102,370 nanograms per milliliter. Urinalysis tests following the appellant's completion of a drug rehabilitation program were negative. After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offenses of which he was convicted, we find the appellant's 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, 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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court