UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MONITRESE L. CHAMPAIGNE
United States Air Force

ACM S30212

17 April 2003

Sentence adjudged 28 August 2002 by SPCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Kevin P. Koehler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and forfeiture of $737.00 pay per month for 3 months.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher.

Before

BURD, ORR, W. E., and ORR, V. A.
Appellate Military Judges

OPINION OF THE COURT

BURD, Senior Judge:

On 28 August 2002, the appellant was tried by special court-martial composed of a military judge sitting alone at Seymour Johnson Air Force Base (AFB), North Carolina. Consistent with her pleas, she was found guilty of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, and wrongful appropriation of a motor vehicle, in violation of Article 121, UCMJ, 10 U.S.C. § 921. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and to forfeit $737.00 pay per month for 3 months. The convening authority approved the adjudged sentence.

This case was submitted to us on its merits. However, in so doing, the appellant included the following statement as a footnote to her assignment of errors.

> Although the appellant does not assert prejudice, please note that the military judge improperly forced the appellant to complete the foundation for a government sentencing exhibit. R. at 43-45. Also, the trial counsel improperly argued that the appellant has "no rehabilitation potential *in the Air Force*." R. at 56, 62 (emphasis added).

While we are compelled to comment upon the matters raised in the appellant's footnote, we agree with her implied concession that any error is harmless. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We do not agree with the appellant's claim that the military judge improperly forced the appellant to complete the foundation for a government sentencing exhibit. The exhibit was a letter of admonishment, dated 26 July 2002, that included, on a separate page, an indorsement from the appellant, also dated 26 July 2002, acknowledging receipt of the letter and the election to not submit any statements. The indorsement referenced a 24 July 2002 letter of admonishment. The following exchange occurred on this topic.

> [Military judge (MJ)]: [Defense counsel (DC)], any objections to Prosecution Exhibit 4?
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> DC: Yes, your honor. We would object to this as not being a properly maintained document or not sure whether both pages go together. If you'll notice, your honor, that page one is dated 26 July 2002. The first endorsement is dated 24 July 2002 referencing the Letter of Admonishment dated 24 July 02. We cannot be sure that while Airman Champaigne signed a receipt on 26 July whether she was signing for—is there another 24 July Letter of Admonishment out there or is this the one she signed for.
>
> MJ: Okay. Let me just read this real quickly. Trial Counsel, what is your response?
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> [Trial counsel (TC)]: Your honor, all I can say is that it must be a clerical error there. There was only one Letter of Admonishment. As you see, it was signed for and dated on the 26th which is the same date as on the Letter of Admonishment itself.
>
> MJ: I guess, on the front page, it does say, "I certify that this is a true exact copy of an exact copy of the original maintained in the PIF, 4 MSS" and it's dated 22 August 2002. [DC], is there some reason you beli[e]ve there is, in fact, another letter out there or do you agree that, in fact, your client did receive this Letter of Admonishment on 26 July 02?

DC: Your honor, I can't be clear that she did or did not receive it. She did receive a Letter of Admonishment, but my client's not clear as to what date she received that on. She did sign an acknowledgement receiving it on 26 July. Whether that was a different one or this one, and, your honor, the certification is only of page one. It's not of page two and, your honor, I realize the position we're in that this is a judge alone case, but I raise the issue for the record.

MJ: So, you're contending that there may very well be another Letter of Admonishment? There's probably two Letters of Admonishment out there?

DC: Sir, I don't know that and it's not my position to disclose that on behalf of my client, but whether this is an accurate document is the reason we're raising this contention with the document.

MJ: I mean, if you're contending that she didn't receive this, I mean, you can talk to your client and then just find out. Does she recognize this document and is this what she recalls receiving as far as being the Letter of Admonishment? What I see is what could very well be a typographical error that says "24 July" and it's a typographical error on the second page.

DC: Yes, your honor, and we're not saying she didn't receive a Letter of Admonishment. What I'm claiming, sir, is that in accordance with 36-2907, that this document isn't an accurate document. That's the only reason I'm raising the issue, sir.

MJ: And that AFI, it says you cannot have a typographical error?

DC: No, sir, it doesn't say that.

MJ: Okay.

DC: It doesn't say that.

MJ: My problem with this would be if you, and I don't know why it couldn't be determined. Hopefully one doesn't receive a number of Letters of Admonishment where they're not sure what the substance was of the letter. So, I just want to know from your client and from you whether she, in fact, received this letter.

DC: Yes, sir.

(The accused confers with defense counsel.)

DC: Your honor, my client received one Letter of Admonishment.

MJ: Okay. One letter and was this the letter?

(The accused examines Prosecution Exhibit 4 for identification and then confers with her defense counsel.)

DC: Yes, your honor.

MJ: And, Airman Champaigne, this was the letter and it concerns being at a leave location and coming back and it's dated 26 July?

[Accused (ACC)]: Yes, sir.

MJ: So, you did receive this in fact?

ACC: Yes, sir.

MJ: And on the second page, it's Prosecution Exhibit 4 for identification, that particular document and it contains a receipt with what appears to be your signature dated 26 Jul 02. Is that, in fact, your signature?

ACC: Yes, sir.

MJ: And, as far as you remember, that's when you received it?

ACC: Yes, sir.

MJ: All right. I'm going to overrule the objection and not that, obviously, these things should be caught ahead of time and if there was a correction to be made in the date on the endorsement, if it was inaccurate, then that should have been caught, but it appears to be, and Airman Champaigne has said that she received this particular letter, so it appears to be a typographical error when it was, in fact, certified that it was a letter that was in her PIF so what's been marked Prosecution Exhibit 4 for identification is admitted as Prosecution Exhibit 4.

It appears that the military judge became impatient with the defense counsel's quibbling. While impatience under the circumstances may be somewhat understandable,

it is something military judges must always be careful to avoid. *See generally Air Force Standards For Criminal Justice*, Chapter 3, Special Functions of the Military Judge (8 Nov 1999). And an unwilling accused or defense counsel should never be forced to supply information to correct deficiencies in the prosecution's evidence. But this did not occur here. When the military judge stated he was just interested in knowing from the defense counsel and her client whether the appellant received the letter, the defense counsel agreed, consulted with her client, and the information was provided. No objection to providing the information was lodged. Under these circumstances, we conclude the appellant was not "forced" to complete the foundation for the exhibit.

We agree with the appellant's second claim in her footnote, i.e., the trial counsel improperly argued that the appellant has no rehabilitation potential in the Air Force. *United States v. Hampton*, 40 M.J. 457, 459 (C.M.A. 1994), *cited in United States v. Williams*, 50 M.J. 397, 398-99 (1999). The trial counsel first made this statement in his argument for why the appellant deserved to receive a bad-conduct discharge. The trial counsel then added to his improper argument during his rebuttal to the defense argument: "Your Honor, I just wanted to clarify one thing when I said that she has no rehabilitative potential. I think she does have rehabilitative potential. I don't think that that rehabilitative potential is in the Air Force. She doesn't have it for the Air Force."

Seventeen months before the appellant's court-martial, in interpreting Rule for Courts-Martial (R.C.M.) 1001(b)(5) and existing case law, we held that:

> [R]ehabilitative potential testimony that narrows the context of the opinion from the permitted general context of "in society" is improper. To say that an accused has no rehabilitative potential **in the Air Force** is equivalent to saying, "No potential for continued service." [*United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989)].

United States v. Bish, 54 M.J. 860, 864 (A.F. Ct. Crim. App. 2001), *pet. denied*, 55 M.J. 371 (2001). To be clear, it is improper for counsel to argue that an accused has no rehabilitative potential **in the Air Force**. This point should be obvious from the rationale in the line of cases from *Ohrt* to *Bish*. *See Bish* and cases cited therein. *See also* Lieutenant Colonel Lawrence J. Morris, *Military Justice Symposium: New Developments in Sentencing and Post-Trial Procedure*, 1996 Army Law. 106 (Mar 1996). Moreover, our superior court, years ago, held such argument improper. *Hampton*, 40 M.J. at 459, *cited in Williams*, 50 M.J. at 398-99.

We also note that the trial counsel's argument was improper because it was an expression of his personal belief or opinion on the evidence. *See United States v. Knickerbocker*, 2 M.J. 128 (C.M.A. 1977). *Cf. Air Force Standards For Criminal Justice*, Standard 3-5.8, Argument to the Court Members (8 Nov 1999). The Discussion to R.CM. 919(b), which covers argument on findings, states, in part: "Counsel should

not express a person[a]l belief or opinion as to the truth or falsity of any testimony or evidence . . . ." While R.C.M. 1001(g), which covers argument on sentence, does not contain a similar proscription, we are aware of no authority or rationale that would support a distinction. And the making of such an argument before a military judge sitting alone rather than before court members does not negate its improper character.

That the improper argument in this case was before a military judge sitting alone renders its impact harmless. A military judge is presumed to know the law and apply it correctly. *United States v. Robbins*, 52 M.J. 455, 457 (2000), *cert. denied*, 531 U.S. 834 (2000). Likely, the appellant's trial defense counsel understood this in not lodging an objection. In any event, the lack of an objection is waiver. R.C.M. 1001(g). And as we previously said, we agree with the appellant that there is no material prejudice. Art. 59(a), UCMJ.

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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court