UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman ANTHONY J. CLARK
United States Air Force

ACM 34791 (reh)

31 August 2007

Sentence adjudged 02 March 2006 by GCM convened at Yokota Air Base, Japan. Military Judge: Steven A. Hatfield.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeitures of $600 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

This case is before us for the second time. At trial the appellant was convicted of wrongful use of psilocin, disobeying a lawful order, breaking restriction, and wrongful use of methamphetamine. In *United States v. Clark*, 60 M.J. 539 (A.F. Ct. Crim. App. 2004), this Court set aside the specification of wrongful use of psilocin, affirmed the remaining findings and reassessed the sentence. On appeal, our superior court set aside the findings of guilty of disobeying a lawful order and breaking restriction, and set aside the sentence. *United States v. Clark*, 62 M.J. 195 (C.A.A.F. 2005). The Court of Appeals for the Armed Forces affirmed the findings of guilty to the remaining charge and specification and returned the case for a rehearing on the findings which they set aside, or

for a sentence rehearing on the remaining charge and specification if there was no rehearing on the findings.

The convening authority ordered a rehearing only on sentence for the remaining charge and specification of wrongful use of methamphetamine. A panel of officer members sentenced the appellant to a bad-conduct discharge, confinement for 2 months, total forfeitures, and reduction to the grade of E-1. The convening authority approved forfeitures of $600 pay per month for 3 months, but otherwise approved the sentence as adjudged.

The appellant contends: (1) the trial counsel committed error by injecting unlawful command influence during his sentencing argument; and (2) his sentence is inappropriately severe in light of the offense.[1] We find the appellant's contentions without merit and affirm.

Sentencing Argument

The appellant asserts that the trial counsel's sentencing argument injected unlawful command influence into the proceedings because he made reference to Air Force policy. In a portion of his argument, the trial counsel said:

> The Air Force has a system in place to stop drug abuse. It's a simple truth that military service and wrongful use of drugs, they don't mix. That's why we have this system in place—gate sweeps, vol—or random urinalysis.
>
> . . . .
>
> Use your common sense and knowledge of the ways of the world. You know how the Air Force operates. We cannot tolerate drug use in the Air Force. In the military we depend on our wingman. We can't depend on drug users, that's why they have this system. This system worked. Two days after he used meth, he got caught in a random urinalysis.
>
> . . . .
>
> And again you're not deciding a sentence in a vacuum. You're supposed to rely on your common sense and knowledge of the ways of the world. You know how bad drug use is. It's a scourge to society. That's why we can't tolerate it. That's why when you break the law and you use illegal drugs you need to be punished. . . . Sending that message that we cannot tolerate drug use—we cannot.

[1] The appellant raised this issue pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

. . . .

> Help preserve good order and discipline by sending a strong message. Drug use will not be tolerated in the Air Force.

The appellant contends that each time the trial counsel mentioned that "we cannot tolerate drug use" he was referencing the command policy of "zero tolerance." The appellant further contends that trial counsel raised the specter of unlawful command influence by arguing the members should sentence the appellant to a punitive discharge to send the message that drug use would not be tolerated. The appellant avers that the court members were "basically advised that they should act as the commander" and uphold the no tolerance policy by sentencing the appellant to a punitive discharge. The trial defense counsel did not object to the trial counsel's argument.

During argument on sentencing, the trial counsel may offer his or her own personal views concerning an appropriate sentence, but Rule for Courts-Martial 1001(g) expressly prohibits trial counsel from making reference to a convening authority or command policy:

> *Argument.* . . . Trial counsel may not in argument purport to speak for the convening authority or any higher authority, or refer to the views of such authorities or any policy directive relevant to punishment or to any punishment or quantum of punishment greater than that court-martial may adjudge. Trial counsel may, however, recommend a specific lawful sentence and may also refer to generally accepted sentencing philosophies, including rehabilitation of the accused, general deterrence, specific deterrence of misconduct by the accused, and social retribution. Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection.

Our superior court equates unlawful command influence to prosecutorial misconduct. *United States v. Thomas*, 22 M.J. 388, 393 (C.M.A. 1986). It has held that "in cases where unlawful command influence has been exercised, no reviewing court may properly affirm [the] findings and sentence unless it is persuaded beyond a reasonable doubt that the findings and sentence have not been affected by the command influence." *Id.* at 394. Our superior court also applies this standard when actions of those bearing "some mantle of command authority," other than a convening authority or commander, improperly influence a court-martial. *United States v. Stombaugh*, 40 M.J. 208, 211 (C.M.A. 1994) (identifying "many instances of unlawful command influence," including a staff judge advocate briefing to court members before trial). When the issue of unlawful influence is raised on appeal, an appellant must: "(1) show facts which, if true, constitute unlawful command influence; (2) show that the proceedings were unfair; and (3) show that unlawful command influence was the cause of the unfairness." *United*

States v. Biagase, 50 M.J. 143, 150 (C.A.A.F. 1999) (citing *Stombaugh*, 40 M.J. at 213). *See also United States v. Dugan*, 58 M.J. 253, 258 (C.A.A.F. 2003); *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987).

When we consider whether a trial counsel's comments were improper, we examine them "in light of [their] context within the entire court-martial." *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005). *See also United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). "The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Id.* (citing *United States v. Young*, 470 U.S. 1, 16 (1985)).

The appellant contends that this case is similar to *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983), where trial counsel expressly argued drug policy of the Strategic Air Command (SAC). In *Grady*, during *voir dire* the trial counsel ascertained whether each court member was aware of SAC policy of not tolerating drug abusers, and then argued that the members were "somewhat bound to adhere to those policies in deciding on a sentence." *Id.* at 275-76. The trial counsel further reminded the members that in SAC drug offenders "are not eligible for rehabilitation" and for them to even consider rehabilitation "would be foolish, out of the question." *Id.* at 276.

The present case is distinguishable from *Grady*. Here, the trial counsel did not argue any specific command policy, and did not suggest that any particular policy of the Air Force dictated a specific sentence the appellant must receive. We also note there is no evidence indicating a convening authority or commander encouraged the trial counsel's remarks, and trial counsel's argument had no "mantle of authority." To the extent that the trial counsel's argument in this case commented on Air Force policy, we find it does not amount to unlawful command influence, and we find beyond a reasonable doubt that the trial counsel's argument had no prejudicial impact on the court-martial.

The appellant also claims the trial counsel improperly informed the members that the appellant received a bad-conduct discharge at this previous court-martial. We review questions involving argument of counsel referring to unlawful subject matter de novo. *United States v. Alameda*, 57 M.J. 190, 198 (C.A.A.F. 2002). In the present case, the trial defense counsel did object to this portion of trial counsel's argument. When a proper objection to comments in arguments is made at the trial level, those comments are reviewed for prejudicial error. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005). We find that the trial counsel did not actually reveal the appellant's previous sentence, but instead commented on the fact that the appellant was able to move on with his life despite the federal conviction he received at the previous court-martial. As this case involved a rehearing on the appellant's sentence, it was clear to the members that he had already received a federal conviction. There was no improper suggestion that the appellant should receive a punitive discharge because he received one previously, and we hold there was no prejudicial error.

Sentence Appropriateness

This Court may affirm only such findings and sentence as we find correct in law and in fact, and determine, on the basis of the entire record, should be approved. Article 66(c), UCMJ, 10 U.S.C. § 866(c). When considering sentence appropriateness, we should give "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)).

In conducting our review we must keep in mind that Article 66(c), UCMJ, has a sentence appropriateness provision that is "a sweeping Congressional mandate to ensure 'a fair and just punishment for every accused.'" *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citing *United States v. Bauerbach*, 55 M.J. 501, 504 (Army Ct. Crim. App. 2001)). Article 66(c), UCMJ, "requires that [we] independently determine, in every case within [our] limited Article 66, UCMJ, jurisdiction, the sentence appropriateness of each case [we] affirm." *Baier*, 60 M.J. at 384-85.

We may also take into account disparities between sentences for similar offenses. Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise 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).

After carefully examining the submissions of counsel and taking into account all the facts and circumstances, we do not find the appellant's sentence inappropriately severe. *See Snelling*, 14 M.J. at 268-69. To the contrary, after reviewing the entire record, we find the sentence is appropriate for this offender and his offense. *See Baier*, 60 M.J. at 383-84; *Healy*, 26 M.J. at 395.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

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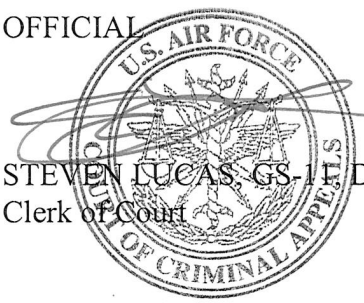

STEVEN LUCAS, GS-12, DAF
Clerk of Court