UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman GARY M. COOPER
United States Air Force

ACM 36521

25 July 2007

Sentence adjudged 6 October 2006 by GCM convened at Hurlburt Field, Florida. Military Judge: Donald Plude.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-2.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Anniece Barber.

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

Before

BRAND, FRANCIS, and SOYBEL
Appellate Military Judges

PER CURIAM:

Contrary to his plea, the appellant was convicted, by officer members, of one specification of wrongful possession of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His adjudged and approved sentence consists of a bad-conduct discharge, confinement for 30 days, and reduction to E-2.

The appellant asserts the evidence was legally and factually insufficient to support his conviction; trial counsel made an improper sentencing argument; and the portion of his sentence that includes the bad-conduct discharge is inappropriately severe.

We have carefully considered the appellant's assertion that the evidence is legally and factually insufficient to sustain his conviction for wrongful possession of cocaine. *See generally United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002); *United States v. Sills*, 56 M.J. 239, 240-41 (C.A.A.F. 2002); *United States v. Turner*, 25 M.J. 324 (C.M.A. 1987). Applying this guidance, we conclude the evidence is legally and factually sufficient. *See United States v. Traylor*, 40 M.J. 248, 249 (C.M.A. 1994).

The appellant was observed by a law enforcement official extending his empty hand to shake the hand of a known drug user. After shaking hands, the appellant withdrew his now clenched hand which he moved to his side. Not once did he look at what was in his hand. When he became aware of the uniformed deputy sheriff's presence, the appellant dropped a packet which was later found to contain 1.98 grams of cocaine. He attempted, three times, to kick the packet under the car. The appellant acknowledged he had the packet and when he saw the deputy, he was sure it contained drugs.

On appeal, the appellant alleges error in that the trial judge allowed the trial counsel to argue that a bad-conduct discharge was warranted in order to distinguish the appellant's service from those who served honorably. The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. *United States v Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). The legal test for improper argument is "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). Whether or not the comments are fair must be resolved when viewed within the entire court-martial. *United States v Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Gilley*, 56 M.J. at 123. Failure to object to improper argument waives the objection absent plain error. Rule for Courts-Martial 1001(g).

Reviewing the record of trial and the trial counsel's argument, it is quite clear the trial counsel's argument focused on a bad-conduct discharge as punishment and was not improper. Additionally, contrary to appellant's assertion in the brief, the trial defense counsel did not object to the sentencing argument.

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 offense, the appellant's record of service, and all matters contained in the record of trial. *United States v Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). We conclude that appellant's sentence, including the bad-conduct discharge, is not inappropriately severe.

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 findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA L. COBLE-BEACH, TSgt, USAF
Court Administrator