UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MAX N. DEAN
United States Air Force

ACM S31899

30 April 2012

Sentence adjudged 8 December 2010 by SPCM convened at Kirtland Air Force Base, New Mexico. Military Judge: William C. Muldoon, Jr.

Approved sentence: Bad-conduct discharge.

Appellate Counsel for the Appellant: Major Michael S. Kerr; Captain Shane A. McCammon; and Captain Andrew J. Unsicker.

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

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

GREGORY, Senior Judge:

A special court-martial composed of officer members convicted the appellant contrary to his plea of one specification of desertion, in violation of Article 85, UCMJ, 10 U.S.C. § 885, and sentenced him to a bad-conduct discharge. The convening authority approved the sentence adjudged. The appellant assigns two errors which concern the sentencing instructions and the appropriateness of his sentence.

During deliberations on sentence, the members returned to open court with a question concerning authorized punishments:

> PRES: After reading the worksheet, we realize we haven't got the [written] instructions yet but we were wondering if we were limited to what's on the worksheet?
>
> MJ: Yes. Was there something in particular you were asking about?
>
> PRES: Well, we were particularly interested in discharges.
>
> MJ: The only type of discharge that a court-martial is authorized to adjudge in a Special Court-Martial is a Bad-Conduct Discharge. That is your only discharge option.
>
> PRES: Okay.
>
> MJ: Anything further?
>
> PRES: No, Your Honor.

At the request of defense counsel and over trial counsel's objection, the military judge provided further explanation concerning administrative discharge:

> Members, as you indicated by your question, some of you are familiar that there are other types of discharges. That type of discharge is an administrative discharge and a collateral matter. Your duty is to adjudge an appropriate sentence for this accused that you regard is fair and just when it is imposed. And [sic] not one whose fairness depends upon the actions that others take or may not take on this case after the trial.

Defense counsel affirmed that this additional instruction satisfied his request, and the court members had no additional questions. Despite being satisfied with the instructions at trial, the appellant now argues that the military judge should have done more. Given the lack of objection or, more specifically, the express approval of the instructions, we review the instructions for plain error. Rule for Courts-Martial (R.C.M.) 1005(f); *United States v. Griffin*, 25 M.J. 423, 425 (C.M.A. 1988).

A military judge must inform the members of their right to recommend clemency "in a proper case." *United States v. Perkinson*, 16 M.J. 400, 401 (C.M.A. 1983) (quoting *United States v. Keith*, 46 C.M.R. 59, 62 (C.M.A. 1972)). In *Perkinson*, the court members lined through the words "bad-conduct discharge" on the sentencing worksheet and substituted a general discharge, and the military judge informed them that the only discharge options were a bad-conduct discharge or no discharge. *Id*. at 401-02. The Court found that the "mere attempt" to award a general discharge was insufficient to show the members' intent to recommend clemency and, therefore, no instructions on clemency options were required. *Id*. at 402.

Like *Perkinson*, this is not a proper case for additional clemency instructions. The members simply asked about their sentencing options without recommending or even mentioning administrative discharge or clemency. At the appellant's request, the military judge clarified that administrative discharge was a collateral matter and that they should not rely on the possible actions of others in adjudging a sentence. Such an instruction is shown to be all the more unnecessary by the court president's later submission of a clemency statement to the convening authority endorsed by all but one court member which recommended "a less severe type of discharge" than the adjudged bad-conduct discharge. Under the circumstances of this case, we find no plain error in the military judge's response to the court members' question. In short, this was not a proper case for the military judge to provide additional sua sponte instructions on clemency.

We note that the military judge initially neglected to provide the required instruction concerning reliance on mitigating action by the convening or higher authority. *See* R.C.M. 1005(e)(4). However, in his response to the court members' question on discharge, he provided the substance of this instruction: "Your duty is to adjudge an appropriate sentence for this accused that you regard is fair and just when it is imposed. And [sic] not one whose fairness depends upon the actions that others take or may not take on this case after the trial." This instruction sufficiently covers the substance of the required instruction. *See United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (The substance of instructions determines sufficiency to cover required matters).

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). The appellant's youth, mental health issues, and alcohol abuse are all appropriate matters in mitigation which were considered by the sentencing authority in the context of the principles of sentencing and the offense of desertion. After carefully examining the submissions of counsel, the appellant's military record, and all the facts and circumstances surrounding the offense of which he was convicted, we find the appellant's sentence appropriate.

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