UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DANIEL C. ESTEY
United States Air Force

ACM S30706

22 September 2006

Sentence adjudged 20 July 2004 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Kurt D. Schuman.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $795.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Maria A. Fried, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel Gary F. Spencer and Lieutenant Colonel Robert V. Combs.

Before

MOODY, JOHNSON, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

The appellant was tried by a special court-martial composed of officer members. Pursuant to his plea, the military judge found the appellant guilty of one specification of wrongful use of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His sentence included a bad-conduct discharge, confinement for 3 months, forfeiture of $795.00 pay per month for 3 months and reduction to E-1. The convening authority approved the findings and sentence as adjudged. The appellant now asserts that he was prejudiced by plain error when a government witness based his opinion of the

appellant's potential for rehabilitation on specific instances of misconduct and the charged offense. The appellant also argues that the trial counsel's sentencing argument prejudiced the appellant because it misstated the evidence.[1] He requests this Court grant him relief by ordering a new sentencing hearing or by setting aside the bad-conduct discharge. For the reasons set forth below, we find no merit to these assignments of error and affirm.

Background

During the presentencing phase of the appellant's trial, the government introduced several exhibits from the appellant's military record representing a series of disciplinary infractions. The following table lists the appellant's infractions in chronological order by *date of incident*.

Date of Incident	**Description of Incident**	**Type of Action by Unit & Date Issued**	**Prosecution Exhibit No.**
4 Oct 03	Arrested by civilian law enforcement for driving under the influence of alcohol (DUI) and for possessing an open container of alcohol	Letter of Reprimand (LOR), dated 8 Dec 03	4
6 Nov 03	Failure to report for duty on time	Letter of Counseling, dated 19 Nov 03	3
8 Nov 03	Failure to report for duty on time	LOR, dated 14 Nov 03	2
19-20 Jan 04	Failure to report for duty on time	Nonjudicial punishment action,[2] dated 8 Mar 04	7
9 Apr 04	Failure to report for duty on time, and for being under the influence of alcohol	Nonjudicial punishment vacation action,[3] dated 29 Apr 04	8
10 Jun 04	Failure to report for duty on time, and for being under the influence of alcohol	LOR, dated 21 Jun 04	6

In addition to the above exhibits, the government also offered the testimony of the appellant's first sergeant, Master Sergeant (MSgt) A.S. After establishing that the witness had been a first sergeant for six months, the trial counsel began laying the foundation for the witness's opinion of the appellant's potential for rehabilitation under Rule for Courts-Martial (R.C.M.) 1001(b)(5). MSgt A.S. testified that his source of

[1] This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[2] Pursuant to Article 15, UCMJ, 10 U.S.C. § 815.
[3] Pursuant to *Manual for Courts-Martial, United States*, Part V, ¶ 6a(5).

knowledge about the appellant was due largely to the appellant's "disciplinary situations." He was asked whether it was part of his job to deal with Airmen having disciplinary problems, and whether he had to spend "an ordinate amount of time" with the appellant and his problems. The witness responded affirmatively to both questions. The witness was next asked whether there were problems with the appellant after "he came back with a positive urinalysis." The witness described an incident when the unit was called upon to produce the appellant for an interview with the Air Force Office of Special Investigations after the appellant's positive urinalysis. At that point the unit learned that the appellant was not present at work. Instead, he overslept that morning and was still at home. He reported at 1005 hours with the smell of liquor on his breath. By then, he was over four hours late for work.

The trial counsel's next question was this: "So, Sergeant A.S., based on your knowledge of the accused, his disciplinary problems, and what has brought him here today, do you have an opinion about his rehabilitative potential?" The answer was, "I don't think he's rehabilitative." There was no objection to this testimony.

Evidence of Rehabilitative Potential

The first issue is whether it was plain error for the military judge to admit the testimony of MSgt A.S., when his opinion of the appellant's potential for rehabilitation was based on specific instances of misconduct and the charged offense. As the appellant did not object to this testimony at trial, we must review this question under a plain error analysis. Mil. R. Evid. 103(d); *United States v. Powell*, 49 M.J. 460, 462-63 (C.A.A.F. 1998). Under this analysis, the appellant must establish that there was an error, that the error was plain or obvious, and that the error *materially prejudiced a substantial right.* Article 59(a), UCMJ, 10 U.S.C. § 859(a); *Powell*, 49 M.J. at 463-64.

The very brief testimony by MSgt A.S. included the following: (1) his interaction with the appellant was mainly related to the appellant's disciplinary problems, agreeing with trial counsel that he spent an "inordinate amount of time" on the appellant's problems, but not specifying what those problems were; (2) the fact that the appellant's actions had an impact on the unit; (3) brief testimony regarding one specific instance of misconduct when the appellant showed up four hours late for duty with the smell of alcohol on his breath; and (4) his opinion that the appellant had no rehabilitative potential based on his knowledge of the appellant, the appellant's disciplinary problems and the offense that brought the appellant to court.

R.C.M. 1001(b)(5) provides for rationally-based opinion testimony on rehabilitation potential. It has long been settled that a rationally based opinion is one which is formed based on knowledge of the appellant's character and potential, and by a witness who " must possess 'sufficient information and knowledge about the accused—his character, his performance of duty as a servicemember, his moral fiber, and his

determination to be rehabilitated.'" *United States v. Griggs*, 61 M.J. 402, 408 (C.A.A.F. 2005) (quoting *United States v. Ohrt*, 28 M.J. 301, 304 (C.M.A. 1989)); *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986).

We find that a proper foundation was presented to support the witness's opinion. MSgt A.S.'s opinion that the appellant had poor potential for rehabilitation was rationally based upon his experiences dealing with the appellant over a six-month time span, and how those experiences, as perceived by this witness, formed his view of the appellant's character. That the witness's opinion is based on the charged offense *in part* is not improper. It is improper for a witness to base his opinion solely on the severity of the charged offense. *United States v. Claxton*, 32 M.J. 159, 161-62 (C.M.A. 1991); *Horner*, 22 M.J. at 296.

Before rendering his opinion, however, the witness was invited to discuss matters following notification of the appellant's positive urinalysis test result. Any error that may exist in this testimony arises from the direct examination into a "specific instance of misconduct," the admissibility of which is limited to cross-examination. R.C.M. 1001(b)(5)(E). On direct examination, MSgt A.S. described the incident mentioned in the 21 June 2004 LOR the appellant received for failing to report for duty on time and for being under the influence of alcohol. MSgt A.S.'s testimony on this matter during direct examination did not materially prejudice the substantial rights of the appellant because the LOR, itself, was also before the members as an exhibit. *Cf. Powell*, 49 M.J. at 465 (otherwise inadmissible direct examination testimony of specific conduct does not constitute prejudicial plain error when identical evidence is already before the military judge from the appellant's guilty plea inquiry). Moreover, the appellant admitted that alcohol played a contributing role in all of the misconduct. His sentencing evidence reflected significant positive information subsequent to the positive test result, whereas MSgt A.S.'s testimony was limited to the appellant's behaviors before the test results were known. Based on the above, we do not find the appellant was prejudiced by the single comment on the single, specific instance.

Trial Counsel's Sentencing Argument

We next consider whether the appellant was prejudiced by the trial counsel's sentencing argument which the appellant asserts misstated the exhibits and left the impression that the appellant committed more than one DUI offense. Because there was no objection to the argument before instructions on sentencing, this issue must also be considered under a plain error analysis. *See* R.C.M. 1001(g).

In her sentencing argument, the trial counsel relied heavily on the exhibits listed in the table, supra. The government's theory was that with progressively more severe rehabilitative tools, the appellant should have turned his behavior around, and because he did not, he did not have rehabilitation potential. To make the point, the trial counsel

discussed, inter alia, Prosecution Exhibits 2, 3, and 4, in that order. We have appended these exhibits to this opinion and will continue to reference them by their prosecution exhibit number.

The trial counsel first referred the members' attention to Prosecution Exhibit 2—the 14 November 2003 LOR the appellant received for failing to report for duty on 8 November 2003. The trial counsel urged the members to: "Take a look at the first letter of reprimand. It's dated 14 November 2003. *[The appellant] was driving under the influence and had his driving privileges revoked*. So . . . he couldn't drive [and] had to find alternate means to get to work" (emphasis added). The trial counsel then discussed Prosecution Exhibit 3 before moving on to Prosecution Exhibit 4—the 8 December 2003 LOR the appellant received for driving under the influence and possessing an open container of alcohol in his vehicle on 4 October 2003. Here, the trial counsel characterized the appellant's behavior as "much more serious. It's for not only driving under the influence, but it's also for having an open container in his vehicle. So arguably a much more serious offense than, let's say, driving during revocation or missing mandatory training." Trial defense counsel did not object to this argument.

If the government's exhibits are examined in the chronological order in which the underlying misconduct occurred, it is apparent that the appellant had only one DUI. The trial counsel, however, discussed the exhibits with the members in the chronological order in which the unit issued them to the appellant.[4] Generally, this distinction would be of no consequence; however, in the present case, over two months lapsed between the date of the appellant's DUI/open container offense, and the date the unit issued the appellant the LOR (Prosecution Exhibit 4). The effect of this delay was that the appellant received the LOR for his DUI incident nearly one month *after* receiving the 14 November 2003 LOR which refers to the fact that the appellant "received a DUI revoking [his] base driving privileges" (Prosecution Exhibit 2). The appellant asserts that such presentation of the evidence by the trial counsel could have confused the members into believing that the appellant had twice driven while under the influence of alcohol.[5] We agree; however, we find that appellant's material rights were not substantially prejudiced by the argument.

Any incorrect inference the members may have drawn from the trial counsel's argument regarding Prosecution Exhibits 2 and 4 would have been rectified by the fact that the exhibits were before the members. The members could see for themselves that Prosecution Exhibit 2 addresses a failure to report for duty, rather than a DUI. It is also clear in Prosecution Exhibit 4 that the DUI/open container offense predated the misconduct being addressed in Prosecution Exhibit 2. Consequently, when the

[4] Discussing Prosecution Exhibits 2, 3, and then 4.

[5] A close reading of the trial counsel's argument regarding Prosecution Exhibit No. 2 leaves room for the consideration that the trial counsel had a grasp that the DUI reference was a historical one, and meant for that to be clear. That consideration diminishes when the argument on Prosecution Exhibit No. 4 is reviewed. Trial counsel characterized the appellant's *behavior* as "much more significant" behavior. That argument, without explanation or reference to Prosecution Exhibit No. 2, gives rise to the inference that more than one DUI occurred.

underlying misconduct addressed by Prosecution Exhibits 2 and 4 is considered chronologically, it is clear that the DUI, tangentially referenced in Prosecution Exhibit 2, is the same DUI addressed by Prosecution Exhibit 4. We have confidence that the members could see that the tangential reference in Prosecution Exhibit 2 to the appellant's DUI and subsequent loss of base driving privileges served only as a means of emphasizing to the appellant that he must still report to work on time, loss of base driving privileges notwithstanding.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

Senior Judge MOODY participated in this decision prior to his retirement.
Judge JOHNSON participated in this decision prior to her reassignment.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator

File PIF 8 Dec 03

DEPARTMENT OF THE AIR FORCE

7TH AIRCRAFT MAINTENANCE SQUADRON (ACC)
965 AVENUE D2, SUITE 101
DYESS AIR FORCE BASE, TEXAS 79607-1915

14 November 2003

MEMORANDUM FOR A1C DANIEL ESTEY

FROM: 7 AMXS/9 AMU/ MXABS

SUBJECT: Letter of Reprimand

1. It has come to my attention that you have engaged in conduct that is unacceptable and will not be tolerated. For this conduct, you are hereby reprimanded.

2. Specifically, on 8 November, 2003, at Dyess AFB, TX, you did not report to duty at your prescribed time of 1200 hours. Although you received a DUI revoking your base driving privileges, this does not give you an excuse to not report to duty early. On 8 November, you were verbally counseled by myself, in the presence of TSgt , that relying on other individuals for transportation issues was not a satisfactory means of reporting to duty. I suggested a bicycle be your primary mode of getting to work, and you replied that a bicycle was "not feasible" for your situation. In addition, you have unduly burdened your coworkers by continuously asking for transportation to and from work. Your actions have negatively affected the morale in the OAS shop and cast serious doubt on your ability to uphold basic military standards of conduct. Let me remind you that further infractions of this kind could result in the First Sergeant and Commander giving you a direct order to move into the dormitory facilities to facilitate your timely arrival to duty. I expect you to not make this a trend and to make arrangements other than your coworkers or other active duty members to report to duty early.

3. Privacy Act statement: AUTHORITY: 10 U.S.C. 8013. PURPOSE: To obtain any comments you desire to submit (on a voluntary basis) for consideration concerning this action. ROUTINE USES: Provides you an opportunity to submit comments or documents for consideration. If provided, the comments and documents you submit become a part of this action. DISCLOSURE: Your written acknowledgment of receipt and signature are mandatory. Any other comment or document you provide is voluntary.

4. You will acknowledge receipt and return this letter to me within 3 workdays of your receipt. Any comments or documents you wish to be considered concerning this letter will be included with your response.

SSGT, USAF
Assistant Specialist Section Chief, 9 AMU

1st Ind., A1C Daniel Estey

TO: 7 AMXS/ CSS

Receipt acknowledged this date. Contents noted. ~~I (do)~~ (do not) desire to comment on the allegation. I ~~(have)~~ (have not) attached statements and documents which I desire to be considered.

A1C DANIEL ESTEY
Offensive Avionic Systems Apprentice

Pros Ex 2 ~~for ID~~
Off Page 20
Adm Page 20
Rej Page

Global Power For America

File PIF 2 Docs

DEPARTMENT OF THE AIR FORCE

7TH AIRCRAFT MAINTENANCE SQUADRON (ACC)
965 AVENUE D2, SUITE 101
DYESS AIR FORCE BASE, TEXAS 79607-1915

19 November 2003

MEMORANDUM FOR A1C DANIEL ESTEY

FROM: 7 AMXS/9 AMU/ MXABS

SUBJECT: Letter of Counseling

1. It has come to my attention that you have engaged in conduct that is unacceptable and will not be tolerated. For this conduct, you are hereby counseled.

2. Specifically, on 6 November, 2003, at Dyess AFB, TX, you did not report to CPR training at your prescribed time. You were notified by e-mail on 27 October, 2003 of your appointment, you were given a paper notification of your appointment, and your appointment time and date was briefed at mandatory roll calls. This is a serious infraction of basic military standards of conduct and your inattention to detail will not be tolerated. Your actions shake the foundations of the trusting relationship between a subordinate and his supervisors and cast doubt on your ability to adhere to military protocol. It is imperative you do not make this behavior a trend and work to strengthen the trust needed to have a successful career in the United States Air Force.

3. Privacy Act statement: AUTHORITY: 10 U.S.C. 8013. PURPOSE: To obtain any comments you desire to submit (on a voluntary basis) for consideration concerning this action. ROUTINE USES: Provides you an opportunity to submit comments or documents for consideration. If provided, the comments and documents you submit become a part of this action. DISCLOSURE: Your written acknowledgment of receipt and signature are mandatory. Any other comment or document you provide is voluntary.

4. You will acknowledge receipt and return this letter to me within 3 workdays of your receipt. Any comments or documents you wish to be considered concerning this letter will be included with your response.

//

//

SGT, USAF
Assistant Specialist Section Chief, 9 AMU

1st Ind., A1C Daniel Estey

TO: 7 AMXS/ CSS

Receipt acknowledged this date. Contents noted. I (do) (do not) desire to comment on the allegation. I (have) (have not) attached statements and documents which I desire to be considered.

DANIEL ESTEY, A1C, USAF
Offensive Avionic Systems Apprentice

Pros Ex 3 for HO
Off Page 20
Adm Page 20
Rej Page

Global Power For America

DEPARTMENT OF THE AIR FORCE
7TH AIRCRAFT MAINTENANCE SQUADRON (ACC)
965 Ave D1
DYESS AIR FORCE BASE TEXAS 79607-1915

8 Dec 03

MEMORANDUM FOR: A1C Daniel C. Estey (529-49-6177)

FROM: 7 AMXS/CC

SUBJECT: Letter of Reprimand

1. On or about 4 Oct 03 you were arrested by the Abilene Police Department and charged with Driving While Intoxicated and violating open container laws at or near Abilene, Texas. Your blood alcohol as shown by two breathalyzer tests was .155 or higher when the legal limit is .08. Your actions brought discredit on you, and the Air Force.

2. For conduct of a nature to bring discredit upon the armed forces, you are hereby reprimanded. You committed a crime by driving while intoxicated and having an open container and displayed your total lack of respect for public law and military directives and it will not be tolerated. You have displayed discredit to your section, our squadron, and all of Dyess Air Force Base. Furthermore, you injured this unit's mission capabilities since you will not be able to deploy during the civil court process. Even worse is your decision to risk the lives of civilians you are sworn to protect by driving drunk. Your conduct has brought into question your ability to be a member of the Air Force. Because your conduct is so substandard, I intend to establish an Unfavorable Information File and place you on the Control Roster based on this LOR. Rest assured, any future incident such as this could be dealt with by much harsher discipline or possibly charges under the UCMJ.

3. AUTHORITY: 10 U.S.C. 8013. Purpose: To obtain any comments or documents you desire to submit (on a voluntary basis) for consideration concerning this action. ROUTINE USES: Provides you an opportunity to submit comments or documents for consideration. If provided, the comments and documents you submit become part of the action. DISCLOSURE: Your written acknowledgment of receipt and signature is mandatory. Any other comments or documents you provide are voluntary. You will acknowledge receipt and return this letter to me within 3 workdays of your receipt. Any comments or documents you wish considered concerning this Letter of Reprimand must be included with your response.

4. You will acknowledge receipt by endorsement below. You have three duty days in which to submit matters pertaining to mitigation, rebuttal, or extenuation.

, Lt Col, USAF
Commander

Global Power For America

Pros Ex 4 for ID
On Page 20
Adm Page 20
Rej Page

1st Ind. to LOR dated 6 Dec 03, A1C Daniel C. Estey (529-49-6177)

Receipt acknowledged on this 8th day of Dec 2003. I understand I may submit matters in rebuttal pertaining to this LOR within 3 workdays of receipt.

DANIEL C. ESTEY, A1C, USAF
FR 529-49-6177

I do not wish to rebut. DCE