UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic GREGORY E. EVANS
United States Air Force

ACM S31408

28 October 2008

Sentence adjudged 03 October 2007 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Maura McGowan (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 90 days, and forfeiture of $800.00 pay per month for 3 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Griffin S. Dunham, and Captain Grover H. Baxley.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, and Lieutenant Colonel Matthew S. Ward.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

PER CURIAM:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of divers wrongful uses and distributions of cocaine and marijuana in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consists of a bad-conduct discharge, confinement for 100 days, restriction to base for 60 days, and forfeiture of $800 pay per month for 4 months. Based upon the clemency petitions by the appellant, the convening authority only approved the bad-conduct discharge, confinement for 90 days, and forfeiture of $800 pay per month for 3 months. The appellant today asserts that the military judge erred in admitting a document in sentencing. We find to the contrary and affirm.

Letter of Reprimand as Sentencing Evidence

During sentencing, the prosecution offered a Letter of Reprimand (LOR) received by the appellant, two weeks prior to trial, for providing alcohol to a minor and breaking curfew. At trial and again on appeal the appellant alleges the military judge erred in admitting the LOR because it was given solely to enhance the appellant's punishment at trial and thus had no legitimate "corrective" purpose when issued. He focuses his argument on the fact that an LOR was given vice nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, because it was more expeditious and thus able to be completed prior to trial. The foundation of the appellant's argument is that, as such, the LOR was not given in accordance with departmental regulations as required by Rule for Courts-Martial (R.C.M.) 1001(b)(2) and, alternatively, the prejudicial impact of the information outweighed any legitimate purpose. In support of these arguments, the appellant cites *United States v. Boles*, 11 M.J. 195 (C.M.A. 1981) and *United States v. Zakaria*, 38 M.J. 280 (C.M.A. 1993).

We review a military judge's decision to admit sentencing evidence for an abuse of discretion. *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003). LORs are tools for commanders to "improve, correct, and instruct subordinates who depart from standards of performance, conduct, bearing, and integrity, on or off duty, and whose actions degrade the individual and unit's mission." Air Force Instruction (AFI) 36-2907, *Unfavorable Information File (UIF) Program*, ¶ 3.1 (17 Jun 2005). We have previously held, relying on such regulatory guidance, that an LOR must perform a legitimate corrective or management tool purpose to be admissible, and an LOR must not have been issued merely to aggravate an appellant's punishment. *United States v. Williams*, 27 M.J. 529 (A.F.C.M.R. 1988); *Boles*, 11 M.J. at 198-99. Finally, we have also found that the use of reprimands in lieu of trial by court-martial or nonjudicial punishment inherently constitutes a corrective or management function. *United States v. Hood*, 16 M.J. 557, 560 (A.F.C.M.R. 1983).

In admitting the LOR, the military judge concluded that the misconduct alleged was the type of misconduct that is routinely handled as a LOR. She also found that the misconduct arose fairly recently and that the LOR was not given "merely to add to the possibility of imposing punishment on the accused." In response to these findings, the appellant asks this Court to focus on the testimony of his first sergeant that the decision was made to document the misconduct with an LOR because the commander and the legal office wanted to ensure that the misconduct was a part of the appellant's service record at the time of trial and thus admissible at the pending trial.

Like the military judge, we do not accept the premise that a commander cannot choose to document misconduct with an LOR in order to ensure that the information is before a pending court-martial sentencing authority. We do not believe either R.C.M. 1001(b)(2) or the case law stands for such a proposition. Clearly, commanders have a

continuing need to "improve, correct and instruct" airmen who are awaiting court-martial. AFI 36-2907, ¶ 3.1. At the same time, we believe commanders have a legitimate need to ensure sentencing authorities have a complete picture of an accused's service at the time of trial. A problem arises when a commander seeks to document highly suspect misconduct or extremely aggravated misconduct with an LOR on the eve of trial solely for the purpose of getting it before the sentencing authority. *Boles*, 11 M.J. at 198-99; *Zakaria*, 38 M.J. at 282-83. That is not the case here. Therefore, we are satisfied that the military judge did not abuse her discretion in admitting the LOR.

Finally, even if we found that the LOR was improperly admitted, the next question we would have to answer is whether or not the appellant was "substantially prejudiced" by the erroneous admission of this evidence. *Boles*, 11 M.J. at 199. We find that the appellant was not substantially prejudiced, especially because the trial was before a military judge alone, and the nature of providing alcohol to a minor and breaking curfew pales in comparison to the seriousness of use and distribution of both cocaine and marijuana.

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 sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court