

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic RYAN P. FARGO
United States Air Force**

ACM S30013

16 April 2002

Sentence adjudged 31 July 2001 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Israel B. Willner.

Approved sentence: Bad-conduct discharge and confinement for 25 days.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Shelly W. Schools.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Cheryl D. Lewis.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

ROBERTS, Judge:

The appellant was convicted, pursuant to his pleas, of absenting himself from his unit and wrongful use of cocaine in violation of Articles 86 and 112a, UCMJ, 10 U.S.C. §§ 912a. The approved sentence consists of a bad-conduct discharge and confinement for 25 days. The appellant avers on appeal that the trial judge erred when he refused to give a defense-requested instruction that included specific *Wheeler* factors. *United States v. Wheeler*, 38 C.M.R. 72 (1967). We find no error and affirm.

During a discussion about sentencing instructions at the appellant's second court-martial, trial defense counsel requested that the trial judge instruct the court members as follows: "[The appellant's] [p]ersonal and family troubles that he's indicated and that he's indicated a desire not to receive a Bad Conduct Discharge, lack of Article 15s, and

information he's provided on his mental health condition." The trial judge responded that rather than listing information that both sides intended to argue in their sentencing arguments, he intended to instruct the court members as follows:

In determining the sentence you should consider all the facts and circumstances of the offenses of which the accused has been convicted and all matters concerning the accused[.] [T]hus, you should consider the accused's background, his character, all matters in extenuation and mitigation, and any other evidence that he presented. You should also consider any matters in aggravation.

The trial judge then specifically asked trial defense counsel if that instruction would satisfy her request, to which she replied, "Yes, sir." The appellant now claims on appeal that the sentencing instructions "were not sufficiently tailored to the evidence to adequately inform the court members as to what they should consider in assessing an appropriate sentence."

The issue of whether the court members were properly instructed is a question of law that we review de novo. *United States v. Maxwell*, 45 M.J. 406, 424 (1996). The appellant's failure to object to the proposed instruction at trial forfeited appellate review of this issue on appeal, absent plain error. *United States v. Guthrie*, 53 M.J. 103, 106 (2000) (citing *United States v. Maxwell*, 45 M.J. 406, 426 (1996)); see also Rule for Courts-Martial 920(f). Plain error is error that is clear and obvious, and "materially prejudices the substantial rights of the [appellant]." *United States v. Powell*, 49 M.J. 460, 464 (1998). While we may act on plain error, we are required to correct a plain error only if it "had an unfair prejudicial impact on the [court member's] deliberations." *Id.* at 465 (citing *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)). See also Article 59(a), UCMJ, 10 U.S.C. § 859(a).

We find no error in the instruction as given, and as agreed to by the appellant at trial. Furthermore, this court previously held that "*Wheeler* does not require the [trial judge] to list each and every possible mitigating factor for the court members to consider. It is the duty of the counsel at trial to bring to the attention of the court members, through their arguments, any aggravating, mitigating, or extenuating factors." *United States v. Hopkins*, 55 M.J. 546, 550 (A.F. Ct. Crim. App. 2001) (citations omitted), *aff'd*, No. 01-0739/AF (12 Apr 2002).

The approved findings and the 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. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.



OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator