UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman WILLIAM B. FILYAW
United States Air Force

ACM S32062

2 October 2013

Sentence adjudged 2 May 2012 by SPCM convened at Shaw Air Force Base, South Carolina. Military Judge: Matthew van Dalen.

Approved Sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Nicholas D Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; and Gerald R. Bruce, Esquire.

Before

HELGET, WEBER, and PELOQUIN
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas before a special court-martial comprised of officer members, the appellant was found guilty of three single-specification charges of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced the appellant to a bad-conduct discharge, confinement for 60 days, and reduction to the grade of E-1. The convening authority deferred mandatory forfeitures from 14 days from the date the sentence was adjudged until the date of action, and approved the sentence as adjudged.

On appeal, the appellant asserts numerous assignments of error centered around his contention that the military judge committed plain error by (1) admitting improper command policy evidence, (2) admitting improper rehabilitation evidence and (3) allowing improper argument by the Government. The appellant further asserts ineffective assistance of counsel in light of his trial defense counsel's failure to object to the introduction of such improper evidence and improper argument.[1]

Finding no error materially prejudicial to the substantial rights of the appellant, we affirm.

Background

On 27 December 2011, the appellant received nonjudicial punishment (NJP) for wrongful use of marijuana, in violation of Article 112a, UCMJ. This marijuana use took place during the first two weeks of November 2011 and was discovered pursuant to a test of the appellant's urine. At that time, the appellant's command had in place a policy which required all members whose urine tested positive for illegal drugs to submit to a follow-on urinalysis test once command was notified of a member's positive urinalysis result. The appellant was tested for a second time on or about 13 December 2011. The sample tested positive for marijuana and the appellant received NJP on 8 February 2012, for this second wrongful use of marijuana, in violation of Article 112a, UCMJ.

In accordance with the above-mentioned command policy, the appellant submitted a third urine sample for testing on 26 January 2012, which tested positive for marijuana. This led to the appellant providing a fourth urine sample on 27 February 2012, which tested positive for marijuana. This led to the appellant providing a fifth urine sample on 26 March 2012, which positive for marijuana. These latter three positive urinalysis test results provide the bases for the charge, the additional charge, and the second additional charge of wrongful use of marijuana in violation of Article 112a, UCMJ, which were the subject of this court-martial.

The appellant admitted to all three marijuana uses during his providency inquiry before the military judge. The military judge accepted the plea and found the appellant guilty of all three charges. Sentencing was conducted by members after receiving evidence and hearing argument from government and defense counsel.

Improper Command Policy Evidence

The appellant argues that Master Sergeant (MSgt) ST's testimony improperly referenced command policy as to illegal drug use. No objections to the testimony were raised at trial.

[1] The appellant raises these issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

On direct examination, the appellant's first sergeant, MSgt ST, testified to his discussions with the appellant in the wake of each of the appellant's five positive urinalysis test results. In the course of those discussions, MSgt ST testified that he discussed the Air Force zero tolerance policy regarding the use of illegal drugs.

The appellant, citing *United States v. Grady*, 15 M.J. 275 (C.M.A. 1983), argues that MSgt ST's testimony referencing this zero tolerance policy is plain error in that these references to a zero tolerance policy introduced command influence into sentence deliberations. We disagree.

"Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error." *United States v. Eslinger*, 70 M.J. 193, 198-99 (C.A.A.F. 2011) (citing *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003)). To gain relief under a plain error analysis, the appellant has the burden to demonstrate that: 1) there was error; 2) the error was plain or obvious; and 3) the error materially prejudiced a substantial right of the accused. *United States v. Humphries*, 71 M.J. 209, 214 (C.A.A.F. 2012).

In the context of an argument by trial counsel, it is proper to comment on "'matters of common knowledge within the community.'" *United States v. Fletcher*, 62 M.J. 175, 183 (C.A.A.F. 2005) (quoting *United States v Kropf*, 39 M.J. 107, 108 (C.M.A. 1994)). In *Kropf*, the Court recognized the "knowledge of the Navy's 'zero tolerance' policy for drug offenses" to be common knowledge. *Kropf*, 39 M.J. at 108; *see also United States v Barrazamartinez*, 58 M.J. 173, 175 (C.A.A.F. 2003) (holding that argument discussing the "Commander-in-Chief's war on drugs" referred to a matter of common knowledge).

MSgt ST's testimony regarding Air Force policy amounted to nothing more than a confirmation that the policy existed. As MSgt ST testified, he engaged the appellant in these discussions to ensure the appellant clearly understood and appreciated that an Air Force standard existed and that his actions were inconsistent with those standards. Given the breadth of illegal drug education and awareness training across the Air Force and all Services, it would be wholly unreasonable to conclude that MSgt ST's testimony referencing a zero tolerance drug policy introduced anything but a matter of common knowledge already well known to the members.

Furthermore, MSgt ST's testimony made no reference to potential or expected punishment which may have raised concerns of command influence. Therefore, his testimony did not introduce command influence into the sentencing authority. *See Barrazamartinez*, 58 M.J. at 175 (noting that trial counsel referencing the war on drugs "made no reference to either the Commander-in-Chief's or any other commander's expectations regarding [Barrazamartinez]'s punishment"). MSgt ST's testimony merely recollected his discussions with the appellant, and any references to a zero tolerance

policy reflected those conversations within the context of ensuring the appellant understood Air Force standards.

We find the admission of MSgt ST's testimony did not in any way invoke command influence, and did not amount to error, plain or otherwise.

Improper Rehabilitation Potential Evidence

The appellant argues that portions of MSgt ST's testimony were improper comment on the appellant's rehabilitative potential and should not have been admitted by the military judge. MSgt ST testified without objection on direct examination, and again on re-direct examination that the appellant had no rehabilitative potential with the Air Force due to his multiple uses of illegal drugs in violation of Air Force standards.

No objections were made at trial to MSgt ST's testimony. As such, we proceed with a plain error analysis.

A witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit. Rule for Courts-Martial (R.C.M.) 1001(b)(5)(D); *see also United States v. Ohrt*, 28 M.J. 301, 304-05 (C.M.A. 1989) ("a witness . . . should not be allowed to express an opinion whether an accused should be punitively discharged"). "The use of euphemisms, such as 'No potential for continued service'; 'He should just be separated'; or the like are just other ways of saying, 'Give the accused a punitive discharge.' A court-martial has no other discharge available to it." *Id.* at 305.

On direct examination by the Government, the following exchange occurred between government counsel and MSgt ST:

> Q. Do you [MSgt ST] believe that the accused has rehabilitative potential within the Air Force . . .
>
> A. No.
>
> Q. . . . at this point?
>
> A. No, I don't.
>
> Q. Why do you believe that?
>
> A. He has proven multiple times that he's deviated from the standard.

> Q. And could you elaborate a little bit more as to what standard, how he deviated?
>
> A. The standard of illegal drug use in the Air Force.

On redirect, the Government elicited similar testimony:

> Q. You said previously that [the appellant] doesn't have potential within the Air Force. Why do you believe that that potential—he doesn't have the potential for the Air Force in comparison to potential as a civilian?
>
> A. Well, the potential in the Air Force was due to the deviation from the standards as we've discussed. As far as potential on the outside, one of the discussions I had with him was his interest to attend an [Alcohol and Drug Abuse Prevention and Treatment (ADAPT) program] or some kind of treatment. . . . On the outside he may be able to take advantage of that . . . .

MSgt ST's comments fall squarely within the ambit of *Ohrt*. Though MSgt ST never used the words "separation" or "discharge," it clear that his opinion was that the appellant had no potential for continued service in the Air Force. This opinion evidence is inadmissible under *Ohrt* and R.C.M. 1001(b)(5)(D), despite the trial defense counsel's lack of objection.

That said, we do not find the appellant was prejudiced by this opinion evidence. The appellant did not object to this testimony, indicating that trial defense counsel did not find this testimony particularly damaging. *See United States v. Williams*, 50 M.J. 397, 401 (C.A.A.F. 1999) (observing that an appellant may make a strategic decision not to object to testimony as to the suitability of an administrative discharge based on a decision that such evidence is not harmful to the defense's goals in sentencing). Furthermore, there exists elsewhere in the record abundant evidence of the appellant's recurring misconduct and disregard for military standards, making a bad-conduct discharge wholly appropriate. Finally, defense trial counsel's cross-examination of MSgt ST elicited testimony that ameliorated the impact of the inadmissible testimony.

Accordingly, we find no plain error in the admission of MSgt ST's testimony.

Improper Sentencing Argument

In sentencing, the Government argued for a bad-conduct discharge, a significant period of confinement, forfeiture of two-thirds pay, and reduction to E-1. The Government's argument for the bad-conduct discharge focused on the appropriateness of a bad-conduct discharge in light of the repeated instances of misconduct, the deterrent effect of a bad-conduct discharge, the message such a punishment would send to other

Airmen, and the impact a bad-conduct discharge would appropriately have on the appellant's future. Trial defense counsel did not object to the Government's argument. However, on appeal, the appellant asserts several assignments of error related to the Government's argument.

First, the Government argued to the members that, sans a bad-conduct discharge, the appellant would return to the workplace.

> TC: . . . Imagine what happens if Airman Filyaw doesn't get that bad conduct discharge. We've got a federally convicted person, criminal, showing up to work here in a few days, wearing the uniform just like me, just like you all, just like the hundreds or even thousands of Airmen who are out here on this base and the rest of the Air Force busting their tails to do a good job, do what their supervisors tell them to do and comply with standards.

The appellant did not object to this argument, but now asserts that the Government's argument blurred the distinction between a punitive discharge and administrative separation. He contends that the Government's argument suggests that absent a bad-conduct discharge, the appellant would garner an honorable discharge.

Absent objection, allegations of improper argument are reviewed for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). *See also United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused") (citing *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976)). "It is appropriate for trial counsel . . . to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence." *Id.* (citing *United States v. Nelson*, 1 M.J. 235 (C.M.A. 1975)). When determining whether an argument was improper, the argument "must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *Id.* at 238 (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)).

A punitive discharge is "not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated." *Ohrt*, 28 M.J. at 306. Therefore, trial counsel's sentencing argument may not blur "the distinction between a punitive discharge and administrative separation from the service." *United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992) (citing *Ohrt*, 28 M.J. at 306).

We agree with the appellant's assessment of the Government's sentencing argument. The Government's argument invited the members to focus on retention and assess a sentence that ensured the appellant would be separated from the service by suggesting that barring a bad-conduct discharge, the appellant would indeed be retained.

While the majority of the Government's argument focused on the punitive nature of a bad-conduct discharge, why a bad-conduct discharge was appropriate for this particular case, the impact of a bad-conduct discharge and deterrent effect of a bad-conduct discharge, this portion of the argument indeed blurred the distinction between a punitive discharge and an administrative separation.

However, we find the potential confusion was cured by the military judge's response to the members' question during their deliberations. The military judge appropriately reiterated his instructions and articulated to the members the extent of their authority and options wherein he advised:

> MJ: All right, I'm going to start in reverse order. The first answer is: are you limited to the options on that sheet, yes. That is absolutely the limits of what you are allowed to do. In fact, you are not to speculate as to other types of actions, administrative or otherwise, that might be available outside of a court-martial arena.
>
> . . . .
>
> MJ: All right, now, with respect to other types of options, and I think I've already touched upon that with the last question, you are limited to the options listed in the sentence worksheet. You are not to speculate or to consider any other type of administrative action that could be done outside of this court-martial. What you're limited to are those, and with respect to discharge, you are limited to adjudging a bad conduct discharge or no discharge.

Second, the appellant asserts that the Government's statement in argument that a bad-conduct discharge is "a stain on his military record" equates to a service characterization. We do not share that assessment and fail to see any nexus between the statement and service characterization. A bad-conduct discharge is a form of punishment and, just as with any punishment or reprimand or disciplinary action, may certainly be considered a negative annotation to a servicemember's record of service. But such does not equate, by any stretch, to a conclusion regarding a servicemember's characterization.

Third, the appellant asserts that the Government "made multiple references to zero tolerance of drug use and Air Force standards" in argument and that such references brought command policy into the deliberation room. In our review of the record, we can find no reference to a zero tolerance policy within the Government's argument, nor any reference to command policy. The Government did argue that the Air Force has standards and that enforcement of those standards is essential to maintaining those standards. Such argument merely states the obvious. In fact, the court proceedings

themselves are forums that contribute to an appropriate enforcement of those standards. We find this assertion by the appellant without merit.

Finally, the appellant asserts that the Government's argument improperly referenced the appellant's right to remain silent. The appellant directs our attention to the following comment from the Government's argument:

> TC: The unit was behind him. The unit gave him every chance to succeed. The unit told him to go to ADAPT. Is there any ADAPT in there? No, he was concerned about confidentiality. If he really had a problem, as he wants you to believe, who cares about confidentiality. You go and you get the help that you need.

We concur with the appellant's contention that "[i]t is blackletter law that a trial counsel may not comment on the accused's exercise of his constitutionally protected rights, including his right to remain silent." *United States v. Ashby*, 68 M.J. 108, 122 (C.A.A.F. 2009) (citations omitted). But placed in context, trial counsel's comments cannot reasonably be interpreted as a comment on the appellant's exercise of his right to remain silent. Evidence of the ADAPT program's lack of confidentiality, and the appellant's decision not to participate due, seemingly, to this lack of confidentiality, was raised twice in the record. In both instances, the defense introduced this evidence. The first instance occurred when trial defense counsel elicited testimony from MSgt ST during cross-examination. The second instance occurred during the appellant's unsworn statement when he stated:

> ACC: After my second Article 15[, UCMJ,] is when I was first scheduled for ADAPT, and that's when I found out that there's no such thing as confidentiality. I attempted – or let me rephrase that – I contacted Military One-Source and I discovered Tricare doesn't cover out-patient facilities in this area. I truly felt hung out to dry.

In this instance, the appellant and appellant's counsel introduced into evidence the appellant's interaction with the ADAPT program, the ADAPT program's lack of confidentiality, and the appellant's actions once he had that knowledge in hand. The Government's comments in argument recounted that evidence, and proposed a reasonable inference to rebut portions of the appellant's unsworn statement to the members. The Government's argument was wholly reasonable and does not infringe upon the appellant's constitutional rights.

Ineffective Assistance of Counsel

The appellant contends his trial defense counsel was ineffective because he failed to object to the improper evidence and Government argument. The appellant argues that

such failures resulted in a panel that was misled as to their duty and as to how to comply with their duty. Specifically, the appellant asserts that his counsel "missed" upwards of 24 objections, that these failures amounted to ineffective assistance of counsel, and that a set-aside of the bad-conduct discharge or other appropriate relief is warranted.

We review claims of ineffective assistance of counsel de novo, applying the two-pronged test the Supreme Court set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *See United States v. Tippit*, 65 M.J. 69, 76 (C.A.A.F. 2007). Under *Strickland*, "an appellant must demonstrate: (1) 'a deficiency in counsel's performance that is so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment'; and (2) that the deficient performance prejudiced the defense through errors 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id*. (quoting *United States v. Moulton*, 47 M.J. 227, 229 (C.A.A.F. 1997) (internal quotation marks omitted) (quoting *Strickland*, 466 U.S. at 687)).

The deficiency prong requires that an appellant show that the performance of counsel fell below an objective standard of reasonableness, according to the prevailing standards of the profession. *Strickland*, 466 U.S. at 688. "Disagreements as to the strategic or tactical decisions made at the trial level by defense counsel will not support a claim of ineffective assistance of counsel so long as the challenged conduct has some *reasoned* basis." *United States v. Mansfield*, 24 M.J. 611, 617 (A.F.C.M.R. 1987). The prejudice prong requires a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Evidentiary hearings are required if there is any dispute regarding material facts in competing declarations submitted on appeal which cannot be resolved by the record of trial and appellate filings. *United States v. Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

Trial defense counsel has submitted a comprehensive declaration articulating his assessment of the evidence and argument subject to the appellant's complaint, and a thorough explanation of his actions at trial. The appellant did not submit a declaration. We need not order an evidentiary hearing pursuant to *Ginn*, since this legal issue can be resolved based on the trial defense counsel's declaration as well as the "appellate filings and the record." *Id*. at 248.

In his declaration, trial defense counsel submits he and the appellant had numerous discussions regarding the trial as well as the appellant's overwhelming desire and goal to avoid confinement and a bad-conduct discharge while being mindful that he was on trial for repeated drug offenses. Trial defense counsel did not object to MSgt ST's testimony on Air Force policy because he did not want to draw further attention to the policy, given that the policy is already well known. He did not object to MSgt ST's rehabilitation testimony because he had previously interviewed MSgt ST and had determined he was a

very credible witness. Trial defense counsel did not want to, via a potential response to an objection, present the Government with further opportunity to build up MSgt ST's credibility through additional foundation questions. He did not object to the Government's argument regarding Air Force standards or rehabilitation potential because the discussions on those topics were not pronounced. He did not discern any bases to object to the Government's argument based on concerns regarding service characterization, or the blurring of punitive discharges and administrative separation.

We find that the appellant's allegations regarding trial defense counsel's performance unsubstantiated. There are reasonable explanations for the counsel's trial decisions. His level of advocacy on the appellant's behalf was not "measurably below the performance normally expected of fallible lawyers." *United States v. Polk*, 32 M.J. 150, 153 (C.M.A. 1991).

Conclusion

The approved findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court