UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOSEPH A. FRISBEE
United States Air Force

ACM 35079

11 April 2003

Sentence adjudged 19 February 2002 by GCM convened at Nellis Air Force Base, Nevada. Military Judge: Ronald R. Sticka (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 1 year, and forfeiture of all pay and allowances.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Maria A. Fried.

Appellate Counsel for the United States: Lieutenant Colonel Lance B. Sigmon and Lori M. Jemison (legal intern).

Before

BURD, STONE, and LOVE
Appellate Military Judges

OPINION OF THE COURT

LOVE, Judge:

At a general court-martial, a military judge convicted the appellant, in accordance with his pleas, of attempted distribution of cocaine, attempted use of cocaine, wrongful use of 3,4-methylenedioxymethamphetamine, more commonly known as "ecstasy," and wrongful use of marijuana. Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. His adjudged and approved sentence consists of a bad-conduct discharge, confinement for 1 year, and forfeiture of all pay and allowances. The appellant contends that the trial judge committed plain error in permitting a government witness to describe specific acts of misconduct by the appellant during the sentencing portion of the trial. We disagree and affirm.

The appellant was a 21-year-old airman assigned to the orderly room of the Component Repair Squadron at Nellis Air Force Base, Nevada. He admitted using marijuana on at least 20 occasions near Las Vegas, Nevada in the summer and fall of 2001. In October 2001, he ingested ecstasy. Also in October 2001, he used and attempted to distribute to his girlfriend, a substance he believed to be cocaine, but later concluded was not, based on the fact that it resulted in no physical effects or sensations. The appellant subsequently confessed to illegal drug use prior to his military service, which was not disclosed on his enlistment documents. This misconduct was initially charged as fraudulent enlistment, but was dismissed at trial.

The government's sentencing case revealed that the appellant had 19 months of service and a poor service record, including non-judicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for dereliction of duty and a vacation of suspended non-judicial punishment, also for dereliction of duty. Due to his length of service, he had no enlisted performance reports. The government also introduced into evidence the appellant's unfavorable information file (UIF), which contained the documents noted above, as well as records reflecting poor duty performance, appearance problems, and other minor infractions.

The only government witness to testify at sentencing was Staff Sergeant (SSgt) McCullough, the appellant's supervisor, who was the non-commissioned officer-in-charge of the squadron support staff. Trial counsel asked SSgt McCullough to describe the appellant's work performance. SSgt McCullough described the appellant as "the worst Airman that's ever worked for me. That's A to Z, all total." He then elaborated, describing times when he told the appellant to shave, take a shower, clean his room, etc. and he failed to follow directions. He also testified that the appellant was a poor worker, as evidenced by his failure to deliver messages and record personnel activities, as his job required. SSgt McCullough concluded that the appellant generally couldn't be trusted to carry out basic duties or meet minimum standards, notwithstanding repeated disciplinary measures.

At trial, the defense failed to object to the government witness' testimony. Absent plain error, this issue was waived at trial. Rule for Courts-Marital (R.C.M.) 905(e). Our superior court has recently clarified their standard of review for plain error. *United States v. Tyndale*, 56 M.J. 209 (2001). "To prevail under a plain error analysis, appellant has the burden of persuading this Court that: (1) There was an error; (2) It was plain or obvious; and (3) The error materially prejudiced a substantial right. *Id.* at 217.

Under R.C.M. 1001(b)(5)(D), a government witness may present evidence of rehabilitative potential, or the lack thereof, but may only do so in very general terms. The Discussion to R.C.M. 1001(b)(5)(D) provides that the witness may not elaborate on rehabilitative potential by describing particular acts that support the opinion.

However, in this case, SSgt McCullough was never asked to state an opinion about the appellant's rehabilitative potential. Instead, he was asked to describe the appellant's work performance, which he did. If anything, SSgt McCullough's testimony was cumulative because it was already essentially contained in Prosecution Exhibit 6, which was the appellant's 20-page UIF. The UIF record contained summaries of his misconduct and copies of numerous disciplinary records. It is clear from reading the entire record of trial and reviewing the exhibits that SSgt McCullough's testimony did not "break new ground" on the issue of the appellant's work performance, which was unusually poor. Thus, we hold that the defense has failed to show that admission of the testimony was error, or if it was error, that it materially prejudiced a substantial right of the appellant. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

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 (2002). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

DEIRDRE A. KOKORA, Major, USAF
Chief Commissioner