UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KENNY L. GIBSON
United States Air Force

ACM S31436

21 November 2008

Sentence adjudged 07 December 2007 by SPCM convened at Maxwell Air Force Base, Alabama. Military Judge: Stephen R. Woody (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, Captain Tiaundra Sorrell, and Captain Grover H. Baxley.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Major Brendon K. Tukey.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of dereliction in the performance of his duties, operation of a vehicle while drunk, wrongful use of marijuana on divers occasions, wrongful use of benzodiazepine, a Schedule IV controlled substance, and drunk and disorderly conduct, in violation of Articles 92, 111, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 911, 912a, 934. The approved sentence consists of a bad-conduct discharge, confinement for five months, and reduction to E-1.

The appellant asserts two errors. First, he argues the military judge erred when he included an erroneous element – that the appellant's drunk and disorderly conduct was

"service discrediting" – in the providence inquiry into the Specification of Charge IV. Second, he argues his sentence was inappropriately severe as a result of the military judge's erroneous understanding that the appellant was charged with, and found guilty of, the greater offense of Article 134, UCMJ, Clause 2, drunk and disorderly conduct. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Background

During the evening hours on 10 October 2007, the appellant drank half a pint each of Hennessy and Hypnotic at Maxwell Air Force Base (AFB) - Gunter Annex, AL, and drank another half pint of Captain Morgan at Maxwell AFB. At approximately 2230, the appellant knocked on Airman (Amn) F's dorm room door. The appellant wanted to enter Amn F's room, but she told him no and attempted to shut the door; however, the appellant's hand was in the way and she was unable to shut the door. The appellant entered Amn F's room and asked if she had gonorrhea. Amn F became uncomfortable and asked the appellant to leave, but he ignored her. She then contacted Airman Basic JK for assistance and proceeded to wait for him in the hallway. The appellant followed Amn F, put his arm around her, and told her that he was drunk. When another airman arrived, the appellant departed the dorm.

At approximately 2330, the appellant drove himself in his own vehicle to Gate 4 of Maxwell AFB - Gunter Annex. The gate guard suspected the appellant was intoxicated as he smelled of alcohol and his speech was slurred. The appellant also became ill and was unable to stand. He was subsequently transported to the Baptist Medical Center South, where he provided a urine sample and a blood sample. An analysis of the urine sample indicated a positive result for the presence of marijuana. The blood test revealed a blood alcohol content of .209.

The appellant is from Winfield, AL, which is located approximately 100 miles from Maxwell AFB - Gunter Annex. On both 29 September 2007 and 13 October 2007, the appellant used marijuana with a civilian friend while in Winfield, AL. On or about 19 October 2007, the appellant was again back in Winfield, AL. He had been experiencing pain in his shoulder and could not sleep so he asked one of his civilian friends to give him something to help him sleep. The appellant's friend gave him two pills of benzodiazepine, a Schedule IV controlled substance, which the appellant consumed.

Providence Inquiry

During the providence inquiry into the Article 134, UCMJ, offense of drunk and disorderly conduct (the Specification of Charge IV), the military judge explained the elements, as follows:

(1) That at or near Maxwell Air Force Base, on or about the 10th of October 2007, you were drunk and disorderly; and,
(2) That under the circumstances your conduct was to the prejudice of good order and discipline in the armed forces *or was of a nature to bring discredit upon the armed forces*.

The military judge defined both "conduct prejudicial to good order and discipline" and "conduct which is of a nature to bring discredit upon the armed forces." The trial defense counsel did not object to the military judge's instructions on the elements and definitions for the drunk and disorderly offense.

After the military judge explained the elements and definitions, he went into a detailed discussion with the appellant concerning the appellant's conduct. At no point did the military judge ask a question concerning "service discrediting" conduct. The military judge focused strictly on "conduct prejudicial to good order and discipline."

In the discussion of the offense of drunk and disorderly conduct, the *Manual for Courts-Martial (MCM)* (2005 ed.) states, "Unlike most offenses under Article 134, 'conduct of a nature to bring discredit upon the armed forces' must be included in the specification and proved in order to authorize the higher maximum punishment when the offense is service discrediting." *MCM*, Part IV, ¶ 73.c.(3). The maximum punishment for drunk and disorderly conduct that is of a nature to bring discredit upon the armed forces includes six months confinement; in all other cases, the maximum sentence includes only three months confinement. *Id.* at Part IV, ¶ 73.e.(3).

"[I]n the absence of objection at trial, [we] will apply a plain error analysis under which [the appellant] must show that there was an error, that the error was plain or obvious, and that the error materially prejudiced a substantial right." *United States v. Reyes*, 63 M.J. 265, 267 (C.A.A.F. 2006) (citation omitted).

The military judge did err by including the additional "service discrediting" element when he listed the elements of the drunk and disorderly offense for the appellant. However, other than this introductory explanation, the rest of the *Care*[1] inquiry focused exclusively on the charged element of "conduct prejudicial to good order and discipline." Considering the providence inquiry as a whole, it is clear that the military judge found the appellant guilty of the charged offense. Accordingly, we find that the military judge's error did not materially prejudice a substantial right of the appellant.

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Inappropriately Severe Sentence

The appellant asserts that, "it must be assumed that if the military judge conducted a providency inquiry into the elements of service discrediting drunk and disorderly conduct, then he also considered the maximum sentence for that offense when determining an appropriate sentence for Appellant." We disagree.

This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A 1988).

The maximum punishment in this case was the jurisdictional limit for a special court-martial, which includes a maximum of 12 months confinement and a bad-conduct discharge. The appellant's approved sentence was a bad-conduct discharge, confinement for five months, and reduction to E-1. Having found the military judge's error did not materially prejudice a substantial right of the appellant, we only need to determine if the sentence adjudged was appropriate. Having given individualized consideration to this particular appellant, the nature of the offenses, the appellant's record of service, and all other matters in the record of trial,[2] we hold that the approved sentence is not inappropriately severe.

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; *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000).

[2] At the time of his court-martial, the appellant was 20 years old and had been on active duty since 5 September 2006. In addition to the charged offenses, the appellant's military record included four letters of reprimand for failure to go, not properly wearing his uniform, making a false official statement, and failing a dorm inspection. He also received two letters of counseling, both for failure to go.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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