UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant MICHAEL B. GRANT
United States Air Force

ACM S31768 (f rev)

04 June 2012

Sentence adjudged 17 December 2009 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: W. Thomas Cumbie.

Approved sentence: Bad-conduct discharge, reduction to E-4, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford; Lieutenant Colonel Darrin K. Johns; Major Phillip T. Korman; and Captain Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Daniel J. Breen; Major Deanna Daly; Major Joseph Kubler; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, WEISS, and SARAGOSA
Appellate Military Judges

UPON FURTHER REVIEW

PER CURIAM:

A special court-martial composed of officer members convicted the appellant in accordance with his pleas of one specification of dereliction of duty by providing alcohol to an underage female and two specifications of violating a lawful general order by establishing inappropriate relationships, in violation of Article 92, UCMJ, 10 U.S.C. § 892. The special court-martial panel also found the appellant guilty of making a false official statement to detectives, in violation of Article 107, UCMJ, 10 U.S.C. § 907. The

adjudged and approved sentence included a bad-conduct discharge, reduction to the grade of E-4, and a reprimand.

The appellant raises three issues on this appeal: (1) whether the appellant's commander's presentencing testimony was tantamount to an improper discharge recommendation that raised the specter of unlawful command influence; (2) whether the appellant's sentence to a bad-conduct discharge is inappropriately severe compared to his co-actor's nonjudicial punishment for substantially the same misconduct, and (3) whether the addendum to the staff judge advocate's recommendation (SJAR) contained new matter that was not properly served on the appellant pursuant to Rule for Courts-Martial (R.C.M.) 1107(f)(7).

Presentencing Testimony

A military judge's decisions to admit or exclude evidence are reviewed for an abuse of discretion. *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010) (citing *United States v. Manns*, 54 M.J. 164, 166 (C.A.A.F. 2000). "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, 197-98 (C.A.A.F. 2011) (citations omitted).

R.C.M. 1001(b)(5)(A) authorizes the trial counsel to present testimony and evidence in the form of opinions concerning a servicemember's potential for rehabilitation. However, "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." R.C.M. 1001(b)(5)(D).

A witness's opinion must be based on an assessment of the appellant's character and potential, rather than upon a view of the severity of the offense. *United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986). "Thus, a witness whose opinion is based upon factors other than an assessment of the accused's service performance, character, and potential does not possess a rational basis for expressing an opinion." *United States v. Ohrt*, 28 M.J. 301, 304 (C.M.A. 1989). Furthermore, the opinion testimony of any witness must be rationally based on the witness's perceptions and personal knowledge of the matter. Mil. R. Evid. 602, 701(a); *Eslinger*, 70 M.J. at 199.

The testimony in question is that of the appellant's commander, Lieutenant Colonel (Lt Col) MK.[1] The elicited testimony at issue is as follows:

> Q. And taking into account everything that you know about the accused, from his character to his duty performance to the charges that he's been

[1] While not specifically raised as an issue, the record establishes a sufficient foundation was laid for Lieutenant Colonel MK's knowledge of the appellant's character.

> convicted of today, have you formed an opinion as to his potential for rehabilitation?
>
> A. Rehabilitation as far as what? As far as being a TI, no. As far as being a military member, probably not. He was in a position of trust. When you have that ability and hold that position and you lose it by doing those actions, you can't replace that. You can't fix it.

"[R.C.M.] 1001(b)(5) was not designed to give the prosecutor an opportunity to influence court members to punish the accused by imposing a punitive discharge. It also was 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. In our view, this testimony did not address rehabilitative potential as contemplated by R.C.M. 1001(b) and instead rendered improper opinion that the appellant not be returned to the unit and "probably not" continue service in the military. Even without objection, the military judge should not have allowed such testimony. We find error.

However, under the plain error test, after finding plain or obvious error, we test for prejudice. "We test the erroneous admission or exclusion of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

Factors weighing in favor of a finding of prejudice include the fact that the testimony in question was given by the appellant's commander. In fact, the appellant even asserts in his issue presented that the testimony raised the specter of unlawful command influence. Additionally, adding to the analysis is the fact that the Government highlighted the testimony in rebuttal argument.[2]

On the other hand, we find four factors weighing in favor of a decision of no prejudice to the appellant. First, while the one portion of Lt Col MK's direct examination testimony was improper, it was significantly undercut and cured by the following lengthy and skilled cross-examination:

> Questions by DC:

[2] The assistant trial counsel argued to the members that:

> Colonel [MK] told you earlier that the accused had completely broken trust with him, could not be trusted anymore. He didn't believe he could be rehabilitated even in the Air Force, let alone as a training instructor. Don't give him hard labor without confinement. That would just make him a burden to the unit even more than he's already been. . . . Sentence him to a bad conduct discharge. Sentence him to confinement, 11 months or whatever length of time you see fair. Reduce his stripes, take him down to E-1. And require forfeitures of pay.

Q. Good morning, sir.

A. Good morning.

Q. You mentioned that Sergeant Grant was one of the best instructors in his section.

A. Yes.

Q. In fact, before these offenses, you would characterize his duty performance as exceptional?

A. Correct.

Q. And you base that on the reputation that you heard about?

A. Yes.

Q. And his interactions with his flight?

A. Correct.

Q. And those interactions were always very professional?

A. What I saw, yes.

Q. In fact, for the month of June when you got there you awarded Sergeant Grant performer of the month?

A. Correct.

Q. And that performer of the month was out of about 50 to 60 TIs?

A. Correct.

Q. Only one person per month gets that?

A. Correct.

Q. The award is based on performance?

A. Yes.

Q. Based on some recommendations from others in your training squadron?

A. Correct.

Q. Including your training superintendent?

A. Correct.

Q. But ultimately you make the decision as to who receives the award?

A. Yes, I do.

Q. And you gave it to Sergeant Grant?

A. Correct.

Q. And you mentioned that Sergeant Grant was also a TI trainer?

A. Yes.

Q. Now, to become a TI trainer you have to have more than just experience?

A. Correct.

Q. You have to have the recommendations of others in the squadron?

A. Yes.

Q. Because you want the best of the best training your TIs?

A. Yes.

Q. Now, the TI career field itself is pretty demanding?

A. Yes, it is.

Q. In fact, when you arrived in the squadron you said you had some interviews with all of your TIs?

A. Correct.

Q. During those interviews you found out about six TIs were going through divorces?

A. Had been divorced.

Q. Had been divorced?

A. Correct.

Q. And they indicated that those divorces were linked to the demands of the TI career field?

A. Not sure about that one.

Q. Okay. But based on those interviews, based on the demands of the TI career field, you started some family programs in your squadron?

A. Yes, I did.

Q. Programs that weren't in place before June or July of '09 when you took command?

A. Yes, I did.

Q. Family programs to help alleviate the burdens on the family that TIs had to deal with?

A. Yes.

Q. And the burdens are that they're at work sometimes seven days a week -- seven days a week?

A. Uh-huh, yes.

Q. From about 4:30 in the morning, sometimes 3:30 in the morning?

A. Yes.

Q. Until about 1900, 2100 at night?

A. Yes.

Q. And you recognized that that could have a significant impact on a TI's family life?

A. Yes, it can.

Q. Now, you talked about Sergeant Grant's rehabilitative potential. But he has rehabilitative potential for society, doesn't he?

A. I would say yes.

DC: Nothing further.

Second, the defense evidence admitted on behalf of the appellant was extensive and offered numerous contradictory opinions to Lt Col MK's. Technical Sergeant (TSgt) MJ, a training instructor with the 321st Training Squadron and former instructor to the appellant, testified he believed the appellant was "capable of being the best instructor ever" and that the appellant is "able to be rehabilitated" in the Air Force. Master Sergeant (MSgt) JM, a training instructor for the 320th Training Squadron and supervisor to the appellant, testified that the appellant's "character is fairly strong. I think that he would have the ability to rehabilitate himself." He also testified that, given the opportunity, he believed the appellant could be a productive member of the Air Force. A character letter from MSgt JJ states, "He is a true asset to the United States Air Force and a well rounded leader." A character letter from TSgt JS, a training instructor with the 319th Training Squadron, states, "Although I do not believe he could ever be a Military training instructor again, I believe he has the potential to be a productive member of the Air Force." A character letter from Staff Sergeant (SSgt) MP states, "I feel it would be a great loss to the United States Air Force if he were not allowed to continue with his service. The Air Force needs more leaders like TSgt Grant." A character letter from SSgt BJ, a training instructor with the 320th Training Squadron, states, "I know that he has made a huge mistake but believe he can overcome this situation. I feel that he possesses excellent potential for continued service in the United States Air Force and is an asset to the service." A character letter from SSgt DH states, "The Air Force would be better served to have TSgt Michael B. Grant continue to serve in the United States Air Force." A character letter from Senior Airman JC, a training instructor with the 320th Training Squadron, states, "Although I do not condone his conduct, I feel that he possesses excellent potential for continued service in the United States Air Force and is an asset to the service." A character letter from Mr. MJ, former member of the United States Air Force, states, "I feel that it would be a loss if he were not allowed to continue his service in the United States Air Force."

Third, the appellant faced a maximum punishment of a bad-conduct discharge, one year of confinement, forfeiture of two-thirds pay per month for one year, and reduction to the lowest enlisted grade of E-1; he received a bad-conduct discharge, reduction to E-4,

and a reprimand. After an hour and fifty-four minutes of deliberation, the court was re-opened to address a question from the members. The question was, "Do we have the option of designating a period of confinement followed by a period of hard labor without confinement?" The military judge responded, "The answer to that question is yes, you may do so with the understanding that the total amount of both confinement and hard labor without confinement cannot exceed 12 months." After an additional one hour and thirty-two minutes of deliberation, the members finally had reached a decision on the sentence. This lengthy deliberation seems to indicate that this panel of members gave long and due consideration to all of the evidence presented before rendering a sentence. It does not support a conclusion that Lt Col MK's one comment that the appellant "probably [does] not" have rehabilitation potential for being a military member was overly prejudicial or influential to the members' sentence.

Fourth, the appellant's crimes were directly related to his duty performance. His actions were criminal because of his duty position and the special rules that apply to a military member in the position of a training instructor. The evidence showed his actions were deliberate, planned, and involved two separate trainees. In each case, the inappropriate relationship rose to the level of sexual intercourse. In one situation, he actually drove from Dallas to Wichita Falls in order to have sex with the trainee. It is not inconceivable that members would find his conduct worthy of a bad-conduct discharge.

Considering all of these factors, we find the possibility the appellant would have avoided a punitive discharge, absent Lt Col MK's testimony, is remote. Applying a plain error analysis, we are confident that the testimony of Lt Col MK did not substantially influence the adjudged sentence.

Sentence Comparison

The appellant urges this Court to disapprove the adjudged bad-conduct discharge, asserting that it is inappropriately severe compared to the nonjudicial punishment action received by SSgt SC, whom he describes as his co-actor.

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) (citations omitted); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App.), *aff'd*, 65 M.J. 310 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we 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).

In making a sentence appropriateness determination, we are required to examine sentences of closely related cases and permitted, but not required, to do so in other cases. *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006). "[A]n appellant bears the burden of demonstrating that any cited cases are 'closely related' to his or her case and that the sentences are 'highly disparate.' If the appellant meets that burden . . . then the Government must show that there is a rational basis for the disparity." *Lacy*, 50 M.J. at 288.

"Cases are 'closely related' where, for example, they involve 'coactors involved in a common crime, servicemembers involved in a common or parallel scheme, or some other direct nexus between the servicemembers whose sentences are sought to be compared.'" *United States v. Anderson*, 67 M.J. 703, 706 (A.F. Ct. Crim. App. 2009) (citing *Lacy*, 50 M.J. at 288). "Merely because a case involves similar charges brought under the same section of the UCMJ does not mean it is 'closely related' within the meaning of this Court's mandate to determine sentence appropriateness." *Rangel*, 64 M.J. at 686.

The appellant cites to the nonjudicial punishment action received by SSgt SC as the comparative sentence. The appellant even attached the Air Force (AF) Form 3070A[3] from SSgt SC's case to his written unsworn statement admitted as Defense Exhibit AK and considered by the members. The documentation reveals that SSgt SC was charged with one specification under Article 92, UCMJ, for violating Air Education and Training Command Instruction 36-3209, *Professional and Unprofessional Relationships* (2 March 2007), by wrongfully developing a personal, intimate, or sexual, relationship with Airman (Amn) AO and Airman Basic (AB) DM, trainees. He was also charged with one specification under Article 107, UCMJ, for making a false official statement to Detective SV.

There is no question that SSgt SC was charged with two offenses that were brought under the same article of the UCMJ as in the appellant's case. This alone is insufficient to find the two cases closely related. Other similarities between the two cases that can be found in the record include: (1) Both were members of the 320th Training Squadron; (2) The offenses were committed during the same general time frame; (3) The offenses were investigated by the same detectives, during the same time period, in a joint investigation, and both servicemembers were interviewed on the same date; (4) Lt Col MK was the commander for both servicemembers; (5) Lt Col MK preferred charges against appellant seven days after serving SSgt SC with the AF Form 3070A; and (6) Charges against both servicemembers included an unprofessional relationship with the same AB DM.

[3] Air Force Form 3070A, *Record of Nonjudicial Punishment Proceedings (AB thru TSgt)* (7 March 2007).

The significant difference between the two cases are found in the factual predicate for the charged offenses. Factually, what is known about SSgt SC's unprofessional relationship is what is included in the record of trial. His response to the nonjudicial punishment action is included in Defense Exhibit AK. Therein he describes the unprofessional relationship with AB DM as strictly messages via Facebook. He further describes the unprofessional relationship with Amn AO as beginning with messages on Facebook and further developing into phone calls and text messages. Ultimately, he admits to picking her up from a party at which she was stranded with no ride home, taking her out to a club with him, and inviting her back to his apartment where she spent the night in a separate room. He specifically denied any sexual contact in his nonjudicial punishment response as well as to Detective SV during the investigation. Detective SV testified that his investigation revealed a conflicting statement from Amn AO as to whether she and SSgt SC engaged in sexual intercourse. His punishment included a reprimand and reduction to the grade of E-4 with suspended forfeitures of pay. Contrary to the scarce details known about SSgt SC's unprofessional relationships or the content of the communication between him and Amn AO or AB DM, the record clearly establishes the nature of the unprofessional relationships between appellant and AB DM and Amn NK through his written statements admitting to sexual intercourse with the two Airmen; Facebook communication replete with sexual innuendos, plans to meet, plans to provide the Airman with alcohol, and conscious efforts to conceal the relationship; and the testimony of AB DM. Finally, appellant's written statement admitted as Prosecution Exhibit 1 belies any suggestion that he and SSgt SC were co-actors involved in a common crime, plan, or scheme. He specifically states, "SSgt [C] has no knowledge of myself having sexual relations with [AB DM] nor do I have any of him with any other trainee or tech school airman."

We are not persuaded that the appellant has met his burden of proof in demonstrating these cases are closely related. As such, we do not find that sentence comparison is required. Additionally, given the differences in the extent of the unprofessional relationships and the appellant's added offense of providing an underage trainee with alcohol, as well as the fact that the members were fully aware of all of the above details, we are not convinced that the sentences are highly disparate or lack a rational basis for any differences. The appellant has not suffered any miscarriage of justice by the inclusion of a bad-conduct discharge in his sentence.

The Staff Judge Advocate's Recommendation

The appellant asks that we set aside the action of the convening authority because the Addendum to the SJAR was not served on the appellant or his counsel. The SJAR attached a Personal Data Sheet for the appellant that was clearly erroneous in that it failed

to include his combat duty and a Global War on Terrorism Expeditionary Medal.[4] In a previous decision of this Court, we found that the appellant had made a "colorable showing of possible prejudice" given the omission of the combat duty history and the fact that the most heavily litigated part of this trial was whether or not the appellant should have gotten a bad-conduct discharge. As such, the convening authority's Action was set aside and the case was remanded for post-trial processing consistent with our decision.

Once remanded, the base legal office did not begin the post-trial process anew with a SJAR. Instead, the staff judge advocate drafted an Addendum to the SJAR, dated 16 November 2011, wherein he states:

> However, during appellate review, the Air Force Court of Criminal Appeals returned this case for additional post-trial processing and new convening authority action in order to consider evidence of the Accused's deployment history which was inadvertently omitted from the post-trial package previously. To comply with the ruling of the Air Force Court of Criminal Appeals, I have attached the entirety of the defense sentencing exhibits from trial which include the accused's citation from his deployment to Al Udeid AB, Qatar (Defense Exhibit AD).

Attached to the Addendum was the original clemency submission by the accused, the Record of Trial, and all defense exhibits admitted during the court-martial. The Addendum was not served on the appellant or his counsel. The convening authority signed an endorsement indicating that he "considered the attached matters and specifically reviewed Defense Exhibits A-AK, to include the accused's citation from his deployment to Al Udeid AB, Qatar (Defense Exhibit AD) before taking action in this case."

The process followed subsequent to our initial remand has given rise to this issue on appeal. The appellant argues that this Addendum contained new matter and was required to be served on the appellant and his counsel. The Government argues that the Addendum does not contain new matter and was not required to be served. Counsel for the appellant submitted a request for clemency on 26 January 2010 in response to the SJAR. Attached to this request was a written clemency submission by the appellant and the transcript of the court-martial testimony of TSgt MJ who provided character testimony on behalf of the appellant.

R.C.M. 1106(f)(7) requires that, when new matter is introduced after the accused and counsel have examined the recommendation, the accused and counsel must be served with the new matter and given an opportunity to submit comments. "New matter"

[4] This was the same Personal Data Sheet introduced at trial with no objection by the defense. Neither the defense counsel nor the appellant addressed this error in clemency submissions. It appears overlooked until appeal.

includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. In this case, no new issues were raised, there was no discussion of any new decisions, and only matters from the record of trial were presented to the convening authority. The Convening Authority has now properly considered the previously missing combat/deployment history prior to taking action on the case. We find no new matter was presented in the Addendum to the SJAR and no error occurred in the failure to serve the Addendum to the SJAR on the appellant or his counsel.

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). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court