UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman STEVEN F. HARANGI
United States Air Force

ACM 36950

25 June 2008

Sentence adjudged 05 January 2007 by GCM convened at Fairchild Air Force Base, Washington. Military Judge: Charles Wiedie.

Approved sentence: Bad-conduct discharge, confinement for 3 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Chadwick Conn, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, and Major Donna S. Rueppell.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of two specifications of wrongful distribution of ecstasy, one specification of wrongful possession of lysergic acid diethylamide (LSD), and one specification of wrongful possession of 3,4-methylenedioxy methamphetamine (ecstasy) with the intent to distribute, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a bad conduct discharge, confinement for three years, forfeiture of all pay and allowances, and reduction to E-1.

The appellant raises the following two issues on appeal: 1) whether the military judge abused his discretion when he failed to conduct an implied bias analysis and denied the appellant's challenge for cause; and 2) whether a sentence which includes three years confinement and a bad conduct discharge is inappropriately severe.* Finding no error, we affirm.

Background

The appellant met a female civilian, LF, through mutual friends and told her that he could get her drugs. Some time later the Air Force Office of Special Investigations (AFOSI) found out about this conversation, contacted LF, and asked her if she would act as a confidential informant (LF was previously an active duty member in the security forces squadron). She agreed, and in November 2005 contacted the appellant and asked if he would get her ecstasy. The appellant, who would disc jockey during his off-duty hours at local clubs and events, knew a civilian drug dealer who frequented these clubs. He purchased two pills of ecstasy from the civilian dealer and sold them for the same purchase price to LF. In December 2005, LF again contacted the appellant and asked if he could get her some ecstasy. Later that day, the appellant sold LF five tablets of ecstasy for the same price as he purchased them. Several weeks later, LF again contacted the appellant about the possibility of getting her more ecstasy. They agreed to meet in a restaurant parking lot, where the appellant had offered to provide LF 10 pills of ecstasy for between $50.00 and $100.00. When the appellant arrived at the parking lot, he was apprehended by civilian authorities. A search of the appellant's vehicle revealed the 10 tablets of ecstasy he was planning to sell, as well as four tabs of LSD.

I. Challenge for Cause

The first issue raised on appeal is whether the military judge erred when he denied a defense challenge for cause of a court member, Captain C.

Prior to voir dire, the members were advised that the appellant had pled guilty to two specifications of distribution of ecstasy, one specification of wrongful possession of LSD, and one specification of wrongful possession of ecstasy with the intent to distribute. In addition, during the voir dire conducted by the military judge, all court members agreed that they did not feel compelled to vote for any particular punishment based solely on the nature of the charges, and that they would consider the full range of punishments in deciding an appropriate sentence.

The trial defense counsel, during voir dire, had the following exchange with Captain C:

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* Although the appellant presents as an issue whether three years confinement and a bad conduct discharge is an inappropriately severe sentence, he only requests as relief that the length of his confinement be shortened.

DC: Now when I was going through my series of questions about imposing certain sentences and considering "no punishment" as a possible sentence, I sensed -- and if I'm wrong just let me know – that that gave you a little bit of a pause. Do you feel comfortable in imposing no sentence if the evidence supported it in this case, given the nature of the offenses?

[Captain C]: No.

DC: No, okay. And so, I guess, with respect to confinement and a punitive discharge of some sort, you would have a tough time not imposing one or the other of those?

[Captain C]: Correct.

The trial defense counsel then stopped his questioning, returned to the counsel table, and the judge continued to question Captain C as follows:

MJ: Captain C[], just so I'm clear. You would find it difficult to impose no punishment in this case, is that what you're saying?

[Captain C]: No punishment?

MJ: Right.

[Captain C]: Would I find [it] difficult not to punish him?

MJ: Right. So -- The use of double negatives in there -- You would have to impose some punishment in this case?

[Captain C]: No, not at all, if I don't feel that way.

MJ: Okay. And I think that is where maybe we had some confusion there. And let me just explain, I'm going to give you an option, a range, of potential punishments and it goes from "no punishment," which is a proper sentence in this case, "no punishment," up to the maximum punishment. And court members need to consider that full range of punishments. And as I explained earlier, "consider" does not necessarily mean that you would impose that. What it means is that you will neither foreclose -- make a choice or foreclose a choice without having all the evidence in this case. So, what I need to know is, can you take a look at "no punishment" as an option and say either "yes" or "no," based upon the evidence, at least you

will give it consideration and if it's appropriate impose "no punishment," can you do that?

[Captain C]: Yes, sir.

MJ: Okay. And do you have any hesitation at all in considering that?

[Captain C]: No, sir.

. . . .

Later, the trial defense counsel challenged Captain C for cause:

DC: [W]e would challenge Captain C[] for cause. He did indicate that he could consider "no punishment;" however, when asked specifically about confinement and a punitive discharge, he said it would be difficult no[t] to impose those, given the nature of the offenses. So, given that we would challenge him for cause.

The trial counsel responded by arguing that while Captain C indicated it may be difficult to consider no confinement or punitive discharge, Captain C also indicated that he was willing to consider no punishment.

Finally, the defense counsel responded by stating:

DC: Your honor, I mean, he did sort of express some sort of confusion about imposing "no punishment," but he was very direct and very quick to respond when asked about imposing "no confinement," given the nature of these offenses and imposing "no punitive discharge," in his responses were very quick; I think it would be difficult.

After considering arguments from counsel on the challenge, the military judge ruled as follows:

MJ: I think one of the things when we question court members, we kind of put them in a very awkward position; we ask them a lot of questions about, "Would you do this?" or "Would you do that?" and then we give them no instructions and they have no facts upon which to do that . . . . And there was some confusion, I think, with respect to the question that Captain C[] wasn't sure, I think, whether he wanted to give a "yes" or "no" answer, based upon the question . . . . But what he has indicated, in judging his demeanor and the way he answered the question, is that he will consider all punishments.

. . . .

> So, based upon his sincere, what would appear to the court his sincere response that he will consider all possible punishments, I'm going to deny that challenge for cause.

On appeal, the appellant concedes that the exchange between the military judge and Captain C resolved all issues of actual bias, because of a concern of an inelastic disposition on sentencing. But contrary to their concession on the actual bias issue, the appellant argues on appeal that the military judge only applied an actual bias review and did not conduct the proper inquiry for implied bias. The appellant argues that this failure, in combination with the military judge's denial for the challenge for cause, constitutes an abuse of discretion.

Discussion

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) requires removal of a court member for cause when it is "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." Our superior court has interpreted this mandate to encompass two separate legal tests: actual and implied bias. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Actual bias exists when, for example, a member has a "decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offenses charged." R.C.M. 912(f)(1), Discussion. Implied bias exists when, in the eyes of the public, leaving the member on the panel will do injury to the "perception of appearance of fairness in the military justice system." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). Determinations of member bias, whether actual or implied, are based on the totality of the surrounding circumstances, with due recognition that "challenges for cause are to be liberally granted." *Id.* "Challenges based on implied bias and the liberal grant mandate address historic concerns about the real and perceived potential for command influence on members' deliberations." *United States v. Clay*, 64 M.J. 274, 276-77 (C.A.A.F. 2007).

Whether implied bias exists is determined by objectively viewing the issue "through the eyes of the public, focusing on the appearance of fairness." *United States v. Briggs*, 64 M.J. 285, 286 (C.A.A.F. 2007); *Clay*, 64 M.J. at 276. "Accordingly, a military judge's ruling on implied bias, while not reviewed de novo, is afforded less deference than a ruling on actual bias." *Clay*, 64 M.J. at 276. Moreover, we accord the military judge no deference at all when he fails to indicate on the record the basis for his ruling, either as to the legal standard applied or the relevant facts upon which he relied. *See Briggs*, 64 M.J. at 287. In this regard, "[w]e do not expect record dissertations but, rather, a clear signal that the military judge applied the right law." *Terry*, 64 M.J. at 305 (quoting *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002)).

Analysis

We first note that trial defense counsel never expressed his challenge in terms of actual or implied bias. His challenge was simply stated as a concern that Captain C had an inelastic view toward punishment. In ruling on the trial defense counsel's claim, the military judge directly and squarely concluded that Captain C did not possess an inelastic view in sentencing. We find no error in this conclusion. Captain C clearly demonstrated to the military judge that he would consider the evidence and maintain an open mind regarding all of the punishment options.

On the claim of implied bias, raised for the first time on appeal, the appellant has failed to meet his burden of establishing that grounds for challenge against Captain C based on implied bias existed. *See United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002).

The appellant's argument of implied bias rests on Captain C's one word answers to trial defense counsel's questions about whether he would feel comfortable in imposing no sentence, and whether he would have a tough time not imposing a punitive discharge or confinement. Based on Captain C's answers, the military judge entered into a colloquy with Captain C which demonstrated that Captain C did not have an inelastic predisposition towards a particular sentence, would consider all potential punishments, and would yield to the military judge's instructions. The record does not reasonably suggest implied bias. To the contrary, it reflects the appearance of fairness.

II. Sentence Severity

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. *See United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007). Our superior court has concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002) (quoting *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955)).

Our duty to assess the appropriateness of a sentence is "highly discretionary," but does not authorize us to engage in an exercise 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). Matters submitted in clemency may be considered in evaluating sentence

appropriateness, including items found in the allied papers. *United States v. Peoples*, 29 M.J. 426, 428 (C.M.A. 1990); *Healy*, 26 M.J. at 396.

The appellant argues that his sentence of confinement to three years is too severe, and should be reduced to nine months. In support he points to a series of mitigating factors to include: pleading guilty at his court-martial; working with the civilian police force to target his drug source; working undercover against other military members; and the submission of clemency requests by his commander and first sergeant expressing surprise regarding the severity of the sentence, and asking that confinement time be reduced. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the crime of which the appellant was found guilty, we do not find the appellant's sentence, as approved by the convening authority, inappropriately severe.

Conclusion

The 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. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings, and sentence, are

AFFIRMED.

OFFICIAL

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