UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman SEAN T. HAWES
United States Air Force

ACM S31962

22 February 2013

Sentence adjudged 16 May 2011 by SPCM convened at Little Rock Air Force Base, Arkansas. Military Judge: William C. Muldoon, Jr.

Approved sentence: Bad-conduct discharge, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Daniel E. Schoeni and Captain Thomas C. Franzinger.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

STONE, GREGORY, and SANTORO
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant, pursuant to his pleas, of one specification alleging absence without leave, in violation of Article 86, UCMJ, 10 U.S.C. § 886, and one specification alleging breaking restriction, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The adjudged and approved sentence was a bad-conduct discharge, reduction to E-1, and a reprimand. For the first time on appeal, the appellant alleges that (1) the military judge erred when he admitted rehabilitation potential testimony that expressed a euphemism for a punitive discharge, and (2) the military judge erred by allowing trial counsel to argue said evidence and failing to issue a curative instruction. Finding no error, we affirm.

Sentencing Evidence

The trial counsel called the appellant's first sergeant, Chief Master Sergeant M, as a witness in sentencing. After eliciting testimony about the impact of the appellant's crimes on the unit and establishing the witness' foundation for offering rehabilitation potential testimony, trial counsel asked whether the first sergeant had "the opportunity to form an opinion as to [the appellant's] rehabilitative potential." The witness answered that he had, and that his opinion was "very little rehabilitation."

While discussing the principles of sentencing during sentencing argument, trial counsel referred to the first sergeant's testimony and said, "[T]he goal of rehabilitation is not effective. You can't accomplish the rehabilitation by giving him a more lenient sentence because his service record and the testimony of those who know him best show otherwise." This was trial counsel's sole reference to the first sergeant's testimony in an argument that spans ten pages in the record.

As there was no objection at trial to either the witness' response or trial counsel's argument, we review for plain error. *United States v. Cary*, 62 M.J. 277, 278 (C.A.A.F. 2006). Plain error occurs when (1) an error was committed; (2) the error was plain, clear, or obvious; and (3) the error resulted in material prejudice to a substantial right. *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008).

Applying that standard of review, we discern no error. Trial counsel is permitted to introduce evidence of potential to be rehabilitated "to a useful and constructive place in society." Rule for Court-Martial (R.C.M.) 1001(b)(5). Contrary to the appellant's assertion, the witness' testimony did not suggest that he was limiting his opinion to rehabilitative potential in the military exclusively, and trial counsel's argument did not state or infer that the witness suggested that the appellant be discharged.

Court-Martial Order

Although not raised as an error, we note that the court-martial order erroneously states that the breaking restriction offense was a violation of Article 85, UCMJ, 10 U.S.C. § 885. To correct this clerical error, we direct the convening authority to withdraw the original promulgating order and substitute a corrected order. R.C.M. 1114; Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 10.10 (3 February 2010).

Conclusion

The approved findings and sentence are correct in law[1] and fact, and no error prejudicial to the substantial rights of the appellant occurred.[2] Article 66(c), UCMJ,

[1] Perhaps resulting from the erroneous court-martial order, the effect of the Article 134, UCMJ, 10 U.S.C. § 934, specification's failure to allege the terminal element has not been raised on appeal. The military judge properly advised the appellant of the terminal element and the appellant admitted that his conduct satisfied that element.

10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and the sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

Therefore, in the context of this guilty plea, we find that any error was harmless. *United States v. Ballan*, 71 M.J. 28 (C.A.A.F.), *cert. denied*, 133 S. Ct. 43 (2012) (mem.).

[2] We note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)).