UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic SEAN HIGGINS
United States Air Force

ACM 37576

31 January 2011

Sentence adjudged 14 October 2009 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Katherine E. Oler (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 18 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Lieutenant Colonel Maria A. Fried, Major Darrin K. Johns, Major Michael S. Kerr, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel Don Christensen, Major Deanna Daly, Major Coretta E. Gray, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

A general court-martial composed of a military judge sitting alone convicted the appellant in accordance with his pleas of one specification of dereliction of duty by possessing drug paraphernalia; one specification each of, respectively, wrongfully possessing, distributing, using, and introducing heroin; and one specification of wrongfully using codeine in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The court sentenced him to a bad-conduct discharge, confinement for 18 months, and total forfeitures. The convening authority approved the sentence adjudged. The appellant argues that the erroneous admission of one page in an eight-page nonjudicial punishment sentencing exhibit requires reassessment of his sentence. We disagree.

The appellant entered active duty in March 2007 and admitted during the plea inquiry that he began using heroin sometime in the late summer of 2008. His heavy use of heroin spanned several months from the summer of 2008 until his arrest in June 2009, and his method of use included both sniffing and injecting two to three bags of heroin at a time. He also admitted to bringing heroin onto the base and distributing it "on multiple occasions" to two other Airmen who would pay the appellant in heroin. The codeine use apparently resulted from codeine being mixed with some of the heroin, and the military judge merged the use of both substances for sentencing purposes.

During the sentencing phase, the military judge admitted without objection a record of nonjudicial punishment and a vacation of nonjudicial punishment action as Prosecution Exhibit 3 consisting of eight pages. The last page of the exhibit does not pertain to the appellant, but is the first page of an incomplete vacation of nonjudicial punishment action concerning some other Airman. Neither counsel nor the military judge noticed the erroneous page at trial, the trial counsel did not argue the appellant's nonjudicial punishment record in sentencing, and the appellant's commander testified concerning only the appellant's disciplinary history.

In the absence of objection at trial to the erroneous admission of sentencing evidence, an appellant must show (1) that error occurred, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right. *United States v. Cary*, 62 M.J. 277, 278 (C.A.A.F. 2006). Here, the government concedes the obvious error in admitting a partially completed page of another Airman's nonjudicial punishment action as the last page of an eight-page exhibit, so the focus is on material prejudice.

Like the clerical error in *Cary* that referenced a non-existent nonjudicial punishment action on the personal data sheet, the error here clearly had no prejudicial effect in this judge alone, guilty plea trial. For his extensive crimes involving use and distribution of heroin on a military installation, the appellant received a fraction of the authorized 30 years and three months of confinement. The trial counsel made no mention of the appellant's disciplinary record in his argument for two years of confinement, and the personal data sheet provided to both the military judge and the convening authority correctly states that the appellant has one nonjudicial punishment action. In this context, we are convinced that the erroneous attachment of one page of an incomplete nonjudicial punishment action to an otherwise correct eight-page exhibit concerning the appellant's nonjudicial punishment history had no effect at all, much less a prejudicial one.

Conclusion

The approved findings of guilty 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, 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.

OFFICIAL

STEVEN LUCAS
Clerk of the Court