UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MATTHEW C. HUFF
United States Air Force

ACM 37431

14 September 2009

Sentence adjudged 25 February 2009 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge, confinement for 12 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Maria A. Fried, Major Shannon A. Bennett, and Captain Jennifer J. Raab.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Major Jeremy S. Weber, Captain Joseph J. Kubler, and Gerald R. Bruce, Esquire.

Before

FRANCIS, JACKSON and THOMPSON
Appellate Military Judges

PER CURIAM:

Pursuant to his pleas, a military judge found the appellant guilty of one specification of wrongful use of cocaine and one specification of forgery, in violation of Articles 112a and 123, UCMJ, 10 U.S.C. §§ 912a, 923. A panel of officer members sitting as a general court-martial sentenced the appellant to a bad-conduct discharge, 12 months of confinement, and a reduction to the grade of E-1. The convening authority approved the adjudged sentence.

On appeal, the appellant asks the Court to set aside the findings and the sentence or, in the alternative, reassess his sentence. As the basis for his request, he opines: (1)

his sentence to 12 months of confinement is excessive, and (2) the military judge erred by granting the assistant trial counsel's peremptory challenge against Lieutenant Colonel (Lt Col) AH.[*] In support of his first assignment of error, the appellant cites the relative inconsequential nature of the offenses of which he was convicted, his acceptance of responsibility, and his assistance in helping local law enforcement authorities apprehend suspected drug dealers. He also invites the Court to compare his sentence with those adjudged in other cases; however, he provides no specific cases for comparison. Regarding his second assignment of error, the appellant notes Lt Col AH was the only African-American and only remaining female prospective court member on the appellant's court-martial panel and suggests the prosecution failed to provide a race and gender neutral basis for exercising the peremptory challenge against her. Finding no prejudicial error, we affirm the findings and the sentence.

Background

The appellant elected to plead guilty to the charges and specifications and to be sentenced by officer members. Following the acceptance of his guilty plea, his court-martial proceeded to the sentencing portion of trial. After voir dire, the assistant trial counsel exercised a peremptory challenge against Lt Col AH. The military judge sua sponte asked the assistant trial counsel to articulate her basis for exercising the peremptory challenge against Lt Col AH. The assistant trial counsel responded Lt Col AH was hesitant during questioning, particularly with regard to questions about sentencing and types of punishment. After hearing the trial defense counsel's views on the issue, the military judge granted the assistant trial counsel's peremptory challenge against Lt Col AH.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire 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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, 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).

While it is admirable that the appellant accepted responsibility for his misconduct, it does not lessen the seriousness of his crimes. Moreover, we note this is not the appellant's first "brush with the law." Prior to his court-martial, he received two letters

[*] The second assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

of reprimand for failure to go and a letter of reprimand for driving under the influence of alcohol, and this misconduct evinces poor rehabilitative potential. Additionally, although this Court has discretion to consider and compare other courts-martial sentences, we are required to do so only in closely related cases. *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006) (citing *United States v. Wacha*, 55 M.J. 266, 267-68 (C.A.A.F. 2001)). The appellant fails to reference any closely related cases. Upon consideration, we decline the invitation to engage in sentence comparisons in this case. Furthermore, after carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which he was found guilty, we do not find the appellant's sentence, one which includes a bad-conduct discharge and 12 months of confinement, inappropriately severe.

Peremptory Challenge Against Lt Col AH

In the exercise of a peremptory challenge, "[n]either the prosecutor nor the defense may engage in purposeful discrimination on the basis of race or gender." *United States v. Chaney*, 53 M.J. 383, 384 (C.A.A.F. 2000) (citations omitted). Such is the case even if, as in the case sub judice, the appellant is not of the same race or gender as the challenged member. *United States v. Ruiz*, 49 M.J. 340, 343 (C.A.A.F. 1998) (citing *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994)).

If one party believes the other has exercised a peremptory challenge against a member of a cognizable group based on race or gender, the party opposing the challenge must object and provide the basis for the objection. *Chaney*, 53 M.J. at 385 (citing *United States v. Moore*, 28 M.J. 366, 368 (C.M.A. 1989)). "The party making the challenge is then required to offer a reason for the challenge that is neutral in terms of race or gender, as applicable." *Id*. Before making a factual determination regarding the presence or absence of purposeful discrimination in the prospective member's rejection, the military judge must review the record and weigh the credibility of the counsel making the peremptory challenge. *Id*. (citing *United States v. Greene*, 36 M.J. 274, 281 (C.M.A. 1993)). "The peremptory challenge will be sustained unless the proffered reason is 'unreasonable, implausible, or . . . otherwise makes no sense.'" *Id*. (citing *United States v. Tulloch*, 47 M.J. 283, 287 (C.A.A.F. 1997)). On appeal, the military judge's determination on the issue of purposeful discrimination is given great deference and will be overturned only if it is clearly erroneous. *Id*. (citing *Greene*, 36 M.J. at 281).

In the case at hand, the trial defense counsel did not object to the assistant trial counsel's peremptory challenge against Lt Col AH. Ordinarily, the failure to object to the opposing party's challenge would result in a waiver of the issue because the defense must first establish a prima facie case of purposeful discrimination. *United States v. Irvin*, ACM 37431, unpub. op. at 9 (A.F. Ct. Crim. App. 24 Mar 2005) (citing *Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986); *United States v. Gray*, 51 M.J. 1, 34 (C.A.A.F.

1999)), *aff'd*, 65 M.J. 301 (C.A.A.F. 2007). Trial defense counsel did not have an opportunity to object because the military judge sua sponte raised the issue. Accordingly, we considered the issue as if the trial defense counsel had objected to the assistant trial counsel's peremptory challenge. *Id.* The burden then shifted to the assistant trial counsel to provide a race-neutral and gender-neutral explanation. *Id*.

Here, the assistant trial counsel's explanation for exercising the peremptory challenge against Lt Col AH was not unreasonable, implausible, or otherwise nonsensical. Moreover, while the military judge did not specifically make a finding of no purposeful discrimination, the fact that he raised the issue sua sponte, questioned the parties on the applicability of *Batson v. Kentucky*, and is presumed to know and follow the law, convinces the Court he found no purposeful discrimination. *See id*. (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997); *United States v. Prevatte*, 40 M.J. 396, 398 (C.M.A. 1994); *United States v. Vangelisti*, 30 M.J. 234, 240 (C.M.A. 1990)). Put simply, the military judge did not err in granting the assistant trial counsel's peremptory challenge against Lt Col AH.

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, 10 U.S.C. § 866(c); *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, YA-02, DAF
Clerk of the Court