UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JEZREEL D. IVY
United States Air Force

ACM S31406

17 March 2009

Sentence adjudged 27 September 2007 by SPCM convened at Dover Air Force Base, Delaware. Military Judge: Christopher Santoro.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $650.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, and Major Steven R. Kaufman.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

FRANCIS, Senior Judge:

Consistent with the appellant's plea, a military judge convicted him of one charge and specification of wrongful use of cocaine on divers occasions (specifically, two occasions), in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officer members sentenced him to a bad-conduct discharge, confinement for two months, forfeiture of $650.00 pay per month for two months, and reduction to E-1. The

convening authority approved the sentence as adjudged. On appeal, the appellant asserts that the trial counsel's sentencing argument was improper. Finding no error, we affirm.*

At the time of his trial, the appellant had been on active duty for four years. According to the appellant, his use of cocaine occurred during a bad period in his life. His wife had recently moved away, taking their young daughter with her, and he was having work difficulties. He turned to alcohol, and then cocaine, to cope. He used cocaine twice. The first use was in March of 2007. The appellant was drinking at a bar, and, during a trip to the restroom, saw a man he had been speaking to earlier. The man, a civilian, asked him if he would like some cocaine, and the appellant accepted the offer, snorting "a few" lines with a rolled-up dollar bill. The second use occurred in April of 2007 at a party in Delaware. Again, the appellant was drinking, and at some point a guest offered him cocaine. The appellant accepted the offer, and snorted two lines, again with a rolled-up dollar bill. On both occasions, the appellant provided a urinalysis the following day, and on both occasions, the urinalysis tested positive for cocaine.

The trial counsel offered the following sentencing exhibits: the appellant's personal data sheet; his Enlisted Performance Reports; two letters of counseling for failure to go; one letter of reprimand for failing to comply with his treatment plan in the Air Force's Alcohol and Drug Abuse Prevention and Treatment Program; two records of nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for dereliction of duty and various failures to go; and one record of an action vacating a previously suspended Article 15, UCMJ, punishment, also for failure to go. In addition, the trial counsel called the appellant's first sergeant to testify about the impact of the appellant's misconduct on his unit.

As sentencing exhibits, the trial defense counsel admitted a written unsworn statement, and letters from the appellant's wife, mother, and supervisor, which described the appellant as "reliable," said he had "the ability to learn from his mistakes," and opined that he had high or excellent rehabilitative potential.

The trial counsel argued for confinement for six months, reduction to E-1, and a bad-conduct discharge. The trial defense counsel argued for 30 days confinement, 60 days restriction to base, 90 days hard labor without confinement, and reduction to E-1. The appellant asserts that the trial counsel's argument was improper and inappropriately focused on his prior misconduct and disciplinary history, to include the testimony of the appellant's first sergeant. Further, the appellant argues that trial counsel improperly

* Although not affecting the legal sufficiency of the findings or sentence in this case, there are three errors in the court-martial order. It fails to state that the appellant was charged with divers uses of cocaine instead of a single use. It also incorrectly states the charged location as "within the continental United States," whereas the appellant was charged with divers uses of cocaine "at or near Dover, Delaware." Finally, the order incorrectly states the appellant was sentenced to confinement for 60 days, when he was sentenced to confinement for 2 months. We order promulgation of a corrected court-martial order.

minimized the mitigating factor of his guilty plea, and therefore the members may have sentenced him for more than the crimes to which he pled guilty. The appellant asks that we set aside the sentence and authorize a rehearing. Additional facts necessary to the disposition of this case are recited below.

Discussion

"The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument." *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). In this case, the trial defense counsel did not object to the trial counsel's argument, and so we will apply a plain error analysis. Rule for Courts-Martial (R.C.M.) 1001(g); *United States v. Ramos*, 42 M.J. 392, 397 (C.A.A.F. 1995). To find plain error, we must be convinced: (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Gatewood*, 65 M.J. 724, 725 (C.A.A.F. 2007); *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998).

It is well established that a prosecutor is at liberty to strike hard, but not foul, blows. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000); *United States v. Edwards*, 35 M.J. 351, 356 (C.M.A. 1992); *Berger v. United States,* 295 U.S. 78, 88 (1935)). Whether or not the trial counsel's comments are fair must be viewed within the context of the entire court-martial. *United States v. Gilley,* 56 M.J. 113, 121 (C.A.A.F. 2001). Trial counsel is entitled to respond to matters raised by an accused or his counsel. *Id.* at 121-23. The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Id.* at 123 (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)).

We find no error in the sentencing argument, plain or otherwise. The trial counsel did not over-emphasize the appellant's disciplinary history. In her eight-page sentencing argument, the trial counsel did spend most of one page summarizing the appellant's rather lengthy disciplinary history. This is a reflection of the number of disciplinary actions taken against the appellant and was part of the trial counsel's summary of all the evidence that was before the members, including the appellant's uses of cocaine. Furthermore, the trial counsel was entitled to respond to evidence, offered by the appellant, that the appellant "learned from his mistakes" and had high rehabilitative potential. The trial counsel did not urge the members to sentence the appellant based on his prior disciplinary history. Rather, she presented an argument in accordance with the guidelines of R.C.M. 1001(g).

Neither did the trial counsel err in referencing the testimony of the first sergeant. The appellant concedes that referring to a witness' testimony is not error in and of itself, but argues that the trial counsel's references to the witness in this case improperly "reminded the members" of the witness' "testimony . . . which contained a significant

number of questions and answers involving [the] appellant's disciplinary history." We disagree. Rather, we view trial counsel's argument as properly focusing on the first sergeant's testimony as it pertained to the impact of the appellant's crimes on his unit.

Finally, the appellant argues that a comment by trial counsel, minimizing the mitigation value of his guilty plea, was improper. The trial counsel said:

> Now, the accused has pled guilty which has helped us in having to prove his guilt. He has saved us time and money and effort. However, do not make any mistakes by the fact that he's pleading guilty because there's overwhelming evidence against him. There were two urinalysis that showed that he came up positive for cocaine. He had no choice.

Trial counsel should always be careful to avoid statements that could be viewed as commenting on an accused's rights. However, even if we were to find error, we would find no prejudice. Prior to hearing arguments, the members were instructed by the military judge that "the accused [was] to be sentenced only for the offense" to which he had pled guilty, that his guilty plea was a matter in mitigation, and that the members should consider all the facts and circumstances of the case. "Juries are presumed to follow instructions, until demonstrated otherwise." *United States v. Washington*, 57 M.J. 394, 403 (C.A.A.F. 2002). Nothing in the record before this Court suggest they did not do so here. The appellant used cocaine on two occasions, separated by a month. He had already been given one urinalysis by the time he chose to use cocaine a second time. Considering all the facts and circumstances of this case, including the appellant's offenses, his record of service, and all matters contained in the record of trial, we find the punishment to be appropriate for this appellant. *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).

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.

Judge THOMPSON did not participate.

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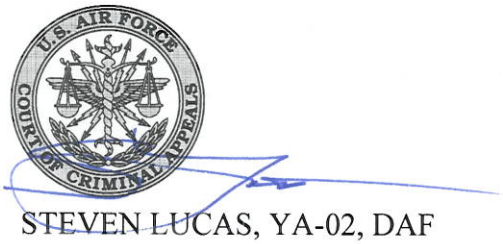

STEVEN LUCAS, YA-02, DAF
Clerk of the Court