UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant MICHAEL J. KANE
United States Air Force

ACM S31641

30 April 2010

Sentence adjudged 07 April 2009 by SPCM convened at Pope Air Force Base, North Carolina. Military Judge: Terry O'Brien (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-2.

Appellate Counsel for the Appellant: Major Marla J. Gillman (argued), Colonel James B. Roan, Major Shannon A. Bennett, and Major Michael Burnat.

Appellate Counsel for the United States: Major Coretta E. Gray (argued), Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Brian C. Mason, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

A military judge sitting as a special court-martial convicted the appellant, in accordance with his pleas, of one specification of wrongful use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a.[1] The adjudged and approved sentence consists of a bad-conduct discharge, 30 days of confinement, and

[1] On 25 March 2010, this Court heard arguments in this case as part of the Project Outreach Program at Suffolk University Law School in Boston, Massachusetts.

reduction to the grade of E-2.[2] On appeal, the appellant asks this Court to set aside the sentence and to remand his case for a sentence rehearing. As the basis for his appeal, the appellant asserts that the military judge committed plain error during the presentencing portion of trial by admitting evidence of uncharged misconduct contained in a letter of reprimand and by allowing the trial counsel to comment on the uncharged misconduct in his sentencing argument. Finding no prejudicial error, we affirm the findings and the sentence.

Background

On five occasions between on or about 10 September 2008 and on or about 29 January 2009, the appellant smoked marijuana in his off-base apartment in Fayetteville, North Carolina. On 9 October 2008, the appellant was randomly selected to provide a urine sample for drug testing. His sample tested positive for tetrahydrocannabinol (THC), the metabolite for marijuana, at 405 nanograms per milliliter (ng/mL) of urine. The Department of Defense (DoD) cutoff for THC is 15 ng/mL. Over the course of the next few months, the appellant's urine was retested pursuant to the 43 AW/CC's Additional Urinalysis Inspection Testing Policy, and those samples tested positive for THC at levels well above the DoD cutoff.

During the presentencing phase of the court-martial, the trial counsel offered as exhibits items from the appellant's personnel records, to include a letter of reprimand, dated 19 March 2009, marked as Prosecution Exhibit 4. This letter of reprimand documented the appellant's sixth positive result for marijuana in his series of drug tests, and noted a positive urinalysis for marijuana from 3 February 2007, nearly two years prior to the charged time frame. The trial defense counsel objected to the admission of Prosecution Exhibit 4, arguing that the letter of reprimand was not proper aggravating evidence under Rule for Courts-Martial (R.C.M.) 1001(b) and that it was not contained in the appellant's personnel records. However, the trial defense counsel withdrew his objection after the trial counsel explained that the document was briefly removed from the appellant's personnel information file (PIF) on the previous day to make copies for trial.[3]

In response to the trial defense counsel's objections during the examination of two witnesses in the presentencing phase of trial, the military judge twice remarked that she was disregarding reference to any instances of uncharged misconduct and that she would

[2] The appellant and the convening authority entered into a pretrial agreement in which the appellant agreed to plead guilty to the Charge and Specification in return for the convening authority's promise not to approve any confinement in excess of 90 days if a punitive discharge was adjudged or any confinement in excess of 120 days if a punitive discharge was not adjudged.

[3] The letter of reprimand was certified as a true copy, bore the appellant's signature acknowledging his receipt of the document and understanding that he had three duty days to respond, included the appellant's written response, and indicated the commander informed the appellant of his final decision after reviewing his comments.

consider only the offenses to which the appellant pled guilty for the purposes of potential punishment.

During his sentencing argument, the trial counsel commented on the alleged 3 February 2007 positive drug test result. After acknowledging that the appellant could be sentenced only for the offenses to which he had pled guilty, the trial counsel referenced Prosecution Exhibit 4 and stated "[w]hat's even more shocking, [is] that this letter of reprimand references a positive test for marijuana that the accused had back in 2007, early 2007." Although the trial defense counsel did not object during the sentencing argument, the appellant now asserts that he was prejudiced by impermissible references to uncharged misconduct in the trial counsel's sentencing argument.

Admission of Prosecution Exhibit 4

Under R.C.M. 1001(b)(2), the prosecution may introduce personal data and information pertaining to the character of the accused's prior service. This rule provides as follows:

> Under regulations of the Secretary concerned, trial counsel may obtain and introduce from the personnel records of the accused evidence of the accused's . . . character of prior service. Such evidence includes copies of reports reflecting the past military efficiency, conduct, performance, and history of the accused and evidence of any disciplinary actions including punishments under Article 15[, UCMJ, 10 U.S.C. § 815].
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> "Personnel records of the accused" includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused. If the accused objects to a particular document . . . as containing matter that is not admissible under the Military Rules of Evidence, the matter shall be determined by the military judge. *Objections not asserted are waived.*

R.C.M. 1001(b)(2) (emphasis added).

Air Force Instruction 51-201, *Administration of Military Justice*, ¶ 8.13 (21 Dec 2007) sets the following guidelines for admission of documents from an accused's personnel information file:

> 8.13.1. Personnel Information File. Relevant material contained in an accused's unit personnel information file (PIF) may be admitted pursuant to RCM 1001(b) if:

8.13.1.1. Counsel provided a copy of the document or made the document available to opposing counsel prior to trial; and

8.13.1.2. There is some evidence on the document or attached to it that:

8.13.1.2.1. The accused received a copy of the correspondence (a document bearing the signature of the accused, or a witnessed statement regarding the accused's refusal to sign, would meet this criterion) and had the opportunity to respond to the allegation; and,

8.13.1.2.2. The document is not over 5 years old on the date the charges were referred to trial.

With respect to an appellant's failure to object to the admission of evidence at trial, a distinction has been made between "forfeiture" and "waiver" of a known right. "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). To determine whether a right has been forfeited or waived, we consider whether the trial defense counsel's failure to object "constituted an intentional relinquishment of a known right." *Id.* Generally speaking, forfeited issues are reviewed for plain error, whereas waived issues are not subject to appellate review. *Id.* (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). When a right has been forfeited, "Military Rule of Evidence 103(d) allows appellate courts to recognize plain errors that materially prejudice an [appellant's] substantial rights." *Id*. at 332 n.2. "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)).

Here, the appellant challenges the admissibility of Prosecution Exhibit 4 based on its reference to uncharged misconduct—namely, a positive drug test for marijuana from 3 February 2007. Before admitting the exhibit into evidence, the military judge asked the defense whether there was an objection to the document. Clearly familiar with R.C.M. 1001(b), the trial defense counsel questioned the basis for admission of the document and sought clarification as to whether it had been properly maintained in the appellant's PIF. After the trial counsel explained that the letter of reprimand had been properly maintained in the file and removed only for copying the previous day, the trial defense counsel unequivocally withdrew his objection. Thus, we find that appellant "intentionally relinquished" his right to object to the admission of Prosecution Exhibit 4 and waived this issue for review.

Even if we were to find that the appellant forfeited his right, the appellant does not prevail on this issue. The letter of reprimand was maintained in the appellant's PIF and was offered as evidence of the appellant's character of prior service. The personnel records were accessible to the trial defense counsel and the appellant before trial, the letter of reprimand indicates that the appellant received a copy and provided a written response, and the document is not over five years old. Thus, Prosecution Exhibit 4 was properly admitted under R.C.M. 1001(b)(2). Moreover, assuming, arguendo, that it was error for the military judge to admit the evidence, such an error was not plain or obvious and the appellant has fallen short of establishing the requisite prejudice. In short, we find no plain error.

Trial Counsel's Sentencing Argument

"When a defense attorney fails to object to a sentencing argument at the time of trial, appellate courts review the statement for plain error." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007); *see also* R.C.M. 1001(g). To find plain error, we must be convinced that: "(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights." *Maynard*, 66 M.J. at 244 (quoting *Hardison*, 64 M.J. at 281).

Here, the evidence was admitted under R.C.M. 1001(b)(2) and considering the context of the trial counsel's entire sentencing argument, we find the remark regarding the letter of reprimand to be a fair comment on the evidence. The error was not plain and there has been no showing of material prejudice to a substantial right of the appellant. On this latter point, we note that the trial defense counsel failed to object to the argument and "the lack of a defense objection is 'some measure of the minimal impact' of a [trial counsel's] improper comment." *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001) (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)). Further, not only are military judges "assumed to be able to appropriately consider only relevant material in assessing sentencing," but in this case the military judge stated on the record that she would not consider uncharged misconduct for the purposes of punishment. *Hardison*, 64 M.J. at 283-84. In this judge alone trial, the military judge did not err by allowing the trial counsel's comment in his sentencing argument, and if there was any error it certainly did not rise to the level of plain error.

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