UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JENNIFER L. KINNIN
United States Air Force

ACM 36934

29 August 2008

Sentence adjudged 18 December 2006 by GCM convened at Seymour Johnson Air Force Base, North Carolina. Military Judge: Stephen R. Woody.

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Maria A. Fried, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Coretta E. Gray.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

HELGET, Judge:

The appellant was tried at Seymour Johnson Air Force Base, North Carolina. In accordance with her pleas, she was found guilty of the wrongful use of cocaine on divers occasions, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. A panel of officer members sentenced the appellant to a bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence.

The appellant raises three issues on appeal. The first issue is whether the trial counsel's sentencing argument constituted plain error because the government improperly argued that the appellant's service record as a whole warranted a bad-conduct discharge characterization. The second issue is whether the appellant's case should be remanded for a new "action" due to post-trial processing errors because the General Court-Martial Order No. 24, dated 2 February 2007, states that the appellant was sentenced by a military judge sitting alone when, in fact, she was sentenced by a panel of officer members, and because the personal data sheet that accompanied the staff judge advocate's recommendation (SJAR) failed to show that the appellant was subjected to pretrial restraint in the form of restriction from 26 September 2006 through 3 October 2006. The final issue is whether the appellant's sentence was inappropriately severe.

Background

At the time of trial, the appellant was 18 years old and had been on active duty for only eight months. She arrived at Seymour Johnson on 28 August 2006. The appellant is originally from Tarboro, North Carolina. Sometime between 1 September 2006 and 3 September 2006, the appellant went to a party in Greenville, North Carolina, with some of her civilian friends and wrongfully used cocaine by snorting two lines approximately the size of her pinky finger. The following weekend, the appellant was with some of her civilian friends at a Marriott Hotel in Rocky Mt., North Carolina, and again wrongfully used cocaine by snorting 5 lines about half the length of her pinky finger. On or about 22 September 2006, at a civilian friend's house in Tarboro, North Carolina, the appellant had a friend buy $20 of cocaine of which she snorted 7 lines approximately the size of her pinky finger.

Trial Counsel's Sentencing Argument

The appellant's first issue is that trial counsel's sentencing argument constituted plain error because the government improperly argued that the appellant's service as a whole warranted a bad-conduct discharge characterization. Trial counsel argued:

> [Assistant Trial Counsel (ATC)]: Furthermore, in Airman Kinnin's short Air Force career, she's already received a Letter of Counseling for failing to show up late [sic] to work and lying about here [sic] whereabouts. She's also received a Letter of Admonishment for failing to meet the standards for maintaining her quarters for a second month in a row.
>
> ATC: Not giving a Bad Conduct Discharge is to say that we accept conduct like this. That our standards have been lowered and that her service, as a whole, has been considered honorable. A Bad Conduct Discharge does not characterize Airman Kinnin. It characterizes her service in the Air Force.

There were no objections made during the trial counsel's argument.

The appellant asserts that the argument misled the members into thinking that the purpose of the bad-conduct discharge was to characterize the appellant's service as a whole, and impermissibly blurred the distinction between administrative and punitive discharges.

"The standard of review for an improper argument depends on the content of the argument and whether the [trial] defense counsel objected to the argument." *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley,* 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Gilley,* 56 M.J. at 123. Failure to object to improper sentencing argument waives the objection absent plain error. Rule for Courts-Martial (R.C.M.) 1001(g). 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. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998).

The appellant relies on *United States v. Ohrt*, 28 M.J. 301, 306 (CMA 1989) where the Court held that the sentencing proceeding is "not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated." The appellant further asserts that the military judge should have sua sponte issued a curative instruction to the members regarding the appellant's service characterization, which he failed to do. *United States v. Fletcher*, 62 M.J. 175, 185 (C.A.A.F. 2005). We disagree.

The argument of trial counsel was proper and fair when viewed within the context of the entire court-martial. During the above-referenced part of the argument, trial counsel was attempting to convince the members that the appellant deserved a bad-conduct discharge. The trial counsel discussed the appellant's repeated use of cocaine in her short Air Force career, how drugs are incompatible with military service, and how the appellant planned to use the cocaine without being caught.* The trial counsel was not referring to retention but rather was attempting to justify the bad-conduct discharge. Further, during voir dire, in response to a question from the trial defense counsel, the

* During her statement to the Air Force Office of Special Investigations, the appellant stated, "I had this mentality that I could do some on Friday nights, not do any more the rest of the weekend, and be fine if there was that chance of a random drug test."

members affirmatively responded that they understood that the question of whether or not the appellant should receive a punitive discharge has greater meaning than whether or not she should be retained in the Air Force. Accordingly, trial counsel's argument was appropriate and the military judge had no duty to give a curative instruction.

Post-Trial Processing Errors

The appellant alleges that her case should be remanded for a new action due to post-trial processing errors. Specifically, she asserts that the General Court-Martial Convening Order No. 24 is defective because it incorrectly states that the appellant was sentenced by a military judge sitting alone when, in fact, she was sentenced by a panel of officer members. Additionally, the appellant alleges that the convening authority was not informed of the appellant's pretrial restraint consisting of restriction to base from 26 September 2006 to 3 October 2006. Neither the SJAR nor the addendum to it informed the convening authority that the appellant had been subjected to pretrial restraint. Further, the personal data sheet (attached to the SJAR and provided to the convening authority) erroneously indicated that there had been no pretrial restraint. Neither the appellant's clemency request nor the appellant's trial defense counsel's submission raised any objections to the SJAR nor did they request any additional credit for the pretrial restriction. At trial, the defense counsel did not submit a motion for pretrial confinement credit and the military judge specifically instructed the members that the appellant had been restricted to base and that they could consider this fact in determining an appropriate sentence.

We review post-trial processing issues de novo. *United States v. Bakcsi*, 64 M.J. 544 (A.F. Ct. Crim. App. 2006). Because the SJAR was properly served on the trial defense counsel and the appellant, and the trial defense counsel failed to comment on the error, we review the omission for plain error. See R.C.M. 1106(f)(6). The appellant must show that (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced the appellant's substantial rights. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Because of the highly discretionary nature of the convening authority's action on a sentence, we may grant relief if an appellant presents "some colorable showing of possible prejudice." *Id.*

The first issue is the erroneous information in the General Court-Martial Convening Order. The error certainly occurred and it is obvious. However, there is no evidence that this error prejudiced a substantial right of the appellant. Although we do not remand this case for a new "action," we do order that the Convening Order be amended to correctly state the appellant was sentenced by a panel of officer members.

The next issue is the omission in the SJAR of any statement concerning the appellant's pretrial restraint. R.C.M. 1106(d)(3)(D) requires the SJAR to include a

statement concerning the nature and duration of any pretrial restraint. Failure to include this information is error. *United States v. Wheelus*, 49 M.J. 283, 285 (C.A.A.F. 1998).

We next consider whether the error resulted in prejudice to the appellant's substantial right to have a request for clemency judged on the basis of an accurate record. In this case, we do not find that the appellant was prejudiced by this error. Considering that the members were instructed at trial to consider the 7-day period of restriction in determining an appropriate sentence, and that the trial defense counsel, in his submission to the convening authority, did not request any additional credit due to the restriction, we find the appellant has not demonstrated a "colorable showing of possible prejudice" in this case.

Sentence is Inappropriately Severe

The final issue is whether the appellant's sentence is inappropriately severe. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the 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). We have a great deal of discretion in determining whether a particular sentence is appropriate, but 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).

The maximum possible punishment in this case was a dishonorable discharge, confinement for 5 years, forfeiture of all pay and allowances, and reduction to E-1. The appellant's approved and adjudged sentence was a bad-conduct discharge, confinement for 5 months, forfeiture of all pay and allowances, and reduction to E-1. Having given individualized consideration to this particular appellant, including her age (18) at the time of the offenses, the nature of the offenses (wrongful use of cocaine on divers occasions), the appellant's record of service, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe.

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; *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