UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman NICOLE M. LOZANO
United States Air Force

ACM S31370

13 August 2008

Sentence adjudged 20 July 2007 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, reduction to E-2, and a reprimand.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Donna S. Rueppell, and Captain Sterling C. Pendleton.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to her pleas, a military judge found the appellant guilty of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sitting as a special court-martial sentenced the appellant to a bad-conduct discharge, a reduction to the grade of E-2, and a reprimand. The convening authority approved the findings and the sentence.[1] On appeal the appellant asks this court

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[1] The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty in return for the convening authority's promise to dismiss a wrongful use of methamphetamine specification.

to set aside her sentence and order a rehearing or, in the alternative, provide meaningful relief from her approved sentence. The basis for her request is that she asserts that trial counsel's sentencing argument was improper and constituted plain error. Finding no error, we affirm.

Background

During the government's sentencing argument, trial counsel made the following comments:

> [1] You must weigh the guilt of Senior Airman Lozano; you must weigh it against the nature of her acts, *the person herself*, the system of justice as a whole, and of course the balance of *good order and discipline*[;]
>
> . . . .
>
> [2] As to her confinement . . . . it is a *specific deterrence*, and it is a *specific punishment* based on the crime. She earned it through her criminal act;
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> . . . .
>
> [3] Whether you're in this courtroom, out of this courtroom, even out of the Air Force, to watch and see whether or not we meet the burden of integrity . . . . [t]he Air Force stays strong and completes its mission by looking to *good order and discipline*[;]
>
> . . . .
>
> [4] A weak sentence, or a slap on the wrist for an abuse of a narcotics [sic] like cocaine, *sends a signal*, whether intentional or not, that the Air Force simply is not concerned with the use of drugs by its members[;]
>
> . . . .
>
> [5] The question you have to consider when you look to the punishment, when you weigh all the factors in evidence, is what kind of Air Force do we have, and what kind of Air Force do we want it to be. Just and proud, or lax in law[;] [and]
>
> . . . .
>
> [6] Therefore the government asks for the *preservation of good order and discipline*, the system of justice, *individual deterrence* and simply *the fear*

> *of punishment* for an illegal deed done . . . for a bad-conduct discharge, three months confinement, two-thirds forfeitures per month for three months, and a reduction in rank to E-1.

(Emphasis added).

Trial defense counsel did not object to trial counsel's sentencing argument. On appeal, the appellant asserts that "trial counsel's combination of good order and discipline with heavy weight on general deterrence created an argument encouraging a mechanistic imposition of sentence, specifically a BCD," and "[t]rial counsel's repeated emphasis on general deterrence, especially at the end of his argument diminished the prospect of an individualized sentence for [the] [a]ppellant."

Improper Sentencing Argument

The line separating acceptable argument from improper advocacy is not easily drawn; there is often a gray area. *United States v. Williams*, 23 M.J. 776, 778 (A.C.M.R. 1987) (citing *United States v. Young,* 470 U.S. 1 (1985)). "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). "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 entire court-martial. *United States v. Gilley,* 56 M.J. 113, 121 (C.A.A.F. 2001).

"It is well established that a prosecutor is at liberty to strike hard, but not foul, blows." *Williams*, 23 M.J. at 778 (citing *Berger v. United States,* 295 U.S. 78, 88 (1935)). Additionally, "[a]rgument need not be sterile or anemic; blunt and emphatic language is essential to effective advocacy in most cases." *Id.* at 779 (citing *United States v. Turner,* 17 M.J. 997, 999 (A.C.M.R. 1984)). However, "trial counsel may not invite the court members to rely on deterrence to the exclusion of other factors. . . . [s]uch an invitation borders on inflammatory argument." *United States v. Lania,* 9 M.J. 100, 104 (C.M.A. 1980). 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 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). In the case at hand, the trial defense counsel did not object to trial counsel's sentencing argument, thus any objection is waived absent plain error. We find no plain error. First, we find no error

with trial counsel's sentencing argument. Contrary to the appellant's assertion, trial counsel did not emphasize general deterrence to the exclusion of other sentencing philosophies but rather, in his argument, placed equal emphasis on preservation of good order and discipline, punishment of the wrongdoer, specific deterrence, and general deterrence. In short, in his sentencing argument trial counsel "struck fair and appropriate blows."

Second, assuming *arguendo* there was error, such was not plain or obvious as the error clearly does not fall within the ambit of errors routinely criticized by our superior and brethren courts. Lastly, there has been no showing that the error, if any, materially prejudiced a substantial right of the appellant. On this point, we note that 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 (quoting *United States v. Carpenter*, 51 M.J. 393, 397 (C.A.A.F. 1999)). Moreover, notwithstanding the lack of a defense objection, the appellant's adjudged sentence is fair and appropriate. She had a less than stellar career[2] and the offense of which she was convicted is serious. In the final analysis, the appellant loses on all three prongs of the plain error test; failure to meet any one prong results in a finding of no plain error.

Erroneous Promulgating Order

Finally we note two errors in the promulgating order. The order erroneously states the sentence was adjudged by the military judge rather than by a panel of officer members. Further, Specification 1 of the Charge incorrectly states the charged period concluded "on or about 17 November 2007" rather than "on or about 17 November 2006." Preparation of a corrected court-martial order, properly reflecting that the sentence was adjudged by officer members and the correct date in Specification 1 of the Charge is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

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).

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[2] She had a civilian "driving under the influence" conviction and had received a reprimand and a referral performance report as a result of the conviction.

Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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