UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CORY J. LUDWIG
United States Air Force

ACM 36312

31 October 2006

Sentence adjudged 4 March 2005 by GCM convened at Little Rock Air Force Base, Arkansas. Military Judge: James L. Flanary.

Approved sentence: Bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Major Jin-Hwa L. Frazier.

Before

ORR, MATHEWS, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

A general court-martial, comprised of officer and enlisted members, convicted the appellant, contrary to his pleas, of one specification of attempted wrongful distribution of Alprazolam (Xanax) on divers occasions, and one specification of wrongful distribution of marijuana on divers occasions, in violation of Articles 80 and 112a, UCMJ, 10 U.S.C. §§ 880, 912a. The approved sentence was a bad-conduct discharge, confinement for 24 months, forfeiture of all pay and allowances, and reduction to E-1.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts two errors for our consideration: (1) Whether the military judge erred by failing to exclude presentencing testimony that was not proper rehabilitation evidence; and (2) Whether the military judge erred by failing to instruct the members in accordance with Rule for Courts-Martial (R.C.M.) 1005(e)(4). For the reasons set forth below, we find merit in the appellant's second assignment of error and reassess the sentence.

Presentencing Testimony

The first assigned error arises from the presentencing testimony of Technical Sergeant (TSgt) F, who supervised the appellant for part of the year prior to the appellant's trial. The government called TSgt F as a witness to offer his opinion about the appellant's rehabilitative potential.

TSgt F testified that one of the appellant's duties was to help maintain the files of over 250 members of the squadron. The error asserted by the appellant is derived from the following portion of TSgt F's testimony on direct examination:

> Q: How did [the appellant] perform in those tasks?
>
> A: In the beginning, he did a really good job and then a couple of months into it, I started noticing that things weren't always in the files ---
>
> DC: Your honor, I'm going to object, the relevance of the job performance. It's not an issue here in the sentencing proceeding and it's not aggravating evidence surrounding the crimes that he's actually been convicted of. So any poor duty performance is not what we're here about in this phase.
>
> MJ: Counsel?
>
> ATC: I'm about to separate from that line of questioning.
>
> MJ: Okay.
>
> Q: [TSgt F] how did having the accused work for you, how did that affect you?
>
> A: How did having him work for me affect me? Having to go back and double check work. There's a few occasions that he was ---

> Q: --- Don't go into specifics, but just how it affected you personally.
>
> A: It made my -- sometimes it made my job more difficult -- time consuming.
>
> Q: How did it affect your shop? How did it affect the work that went on in your shop?
>
> A: Well it slowed down the progress on a few occasions and then caused backups and I had to do more work and double the impact ---

At this point the defense counsel renewed his objection to the impact of appellant's poor duty performance. The military judge gave the following instruction:

> MJ: Counsel, for that particular limited aspect, I will in fact allow the inquiry to continue. Panel members, what I'm about to allow to be asked and answered here is simply going toward potential rehabilitative potential for [the appellant.] You're not to hold this against him as though he's a bad person because of this, but you can consider it for the very limited purpose to determine the rehabilitative potentiality [sic] of [the appellant.]

The assistant trial counsel did not, however, ask TSgt F any further questions and did not solicit his opinion as to the appellant's rehabilitative potential.

We review issues concerning the admissibility of evidence for an abuse of discretion. *United States v. Holt*, 58 M.J. 227, 230 (C.A.A.F. 2003); *United States v. Becker*, 46 M.J. 141, 142-43 (C.A.A.F. 1997). That discretion is abused when evidence is admitted based upon an erroneous view of the law. *Holt*, 58 M.J. at 230-31.

The prosecution has the authority to admit evidence of an accused's rehabilitative potential during the sentencing phase of trial. R.C.M. 1001(b)(5)(A). Evidence of rehabilitative potential can include opinions about an "accused's previous performance as a servicemember and potential for rehabilitation." *Id.* However, "[a]n opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential." R.C.M. 1001(b)(5)(D). This limitation is explained in R.C.M. 1001(b)(5)(D), Discussion, that states:

> On direct examination, a witness . . . may respond affirmatively or negatively regarding whether the accused has rehabilitative potential. The witness . . . may also opine succinctly regarding the magnitude or quality of the accused [sic] rehabilitative potential; for example, the witness . . . may opine that the accused has "great" or "little" rehabilitative potential. The witness . . . generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion.

Specific instances of conduct that may be the basis for a witness's opinion regarding an accused's rehabilitative potential are not admissible on direct examination by the trial counsel. *United States v. Gregory,* 31 M.J. 236, 238 (C.M.A. 1990). Further, "the limitations against mention of specific instances of conduct, except on cross-examination, apply to all opinions given under R.C.M. 1001(b)(5), not just to opinions about rehabilitation potential." *United States v. Sheridan,* 43 M.J. 682, 684 (A.F. Ct. Crim. App. 1995) (holding that R.C.M. 1001(b)(5) uses the term "rehabilitation potential" to include "opinions concerning the accused's previous performance as a servicemember").

We hold that the military judge erred when he overruled the defense counsel's objection and admitted TSgt F's answers to the duty performance questions into evidence. The rules for eliciting opinions on an accused's "rehabilitative potential" are clear and well established. *See* R.C.M. 1001(b)(5). Trial counsel failed to comply with these rules and the military judge erred by allowing the testimony into evidence. *See Gregory,* 31 M.J. at 238.

Having found error, we must now determine whether the appellant was prejudiced by the admission of the improper evidence. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We hold that he was not. In reviewing the entire record, we find that the supervisor's testimony regarding the specific acts of poor performance was cumulative, with an overwhelming amount of similar evidence properly admitted by the military judge. This evidence included two letters of counseling, two records of individual counseling, three letters of reprimand, and nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815. Thus, the improperly admitted statements added little, if anything, to the government's case in aggravation. We find this assignment of error to be without merit.

Sentencing Instructions

The appellant next contends the military judge failed to fully instruct the members in accordance with R.C.M. 1005(e)(4). We review the completeness of required instructions de novo. *United States v. Miller,* 58 M.J. 266 (C.A.A.F. 2003). Required instructions on sentencing include "[a] statement informing the

members that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority." R.C.M. 1005(e)(4); *see also* Department of the Army Pamphlet (D.A. Pam.) 27-9, *Military Judges' Benchbook*, ¶ 2-6-9 (15 Sep 2002). While the trial defense counsel did not object to the military judge's instructions, or bring the missing instruction to the military judge's attention, the waiver rule is "inapplicable to certain mandatory instructions," such as the one required under R.C.M. 1005(e)(4). *See Miller*, 58 M.J. at 270 (citing *United States v. Davis*, 53 M.J. 202, 205 (C.A.A.F. 2000)). We therefore conclude that the military judge erred by failing to instruct the court members as required by R.C.M. 1005(e)(4).

Having found error, we must now determine appropriate corrective action. Our superior court has provided the criterion to determine when we can reassess the sentence rather than remand for a rehearing: "[I]f the court can determine to its satisfaction that, absent any error, the sentence adjudged would have been of at least a certain severity, then a sentence of that severity or less will be free of the prejudicial effects of error . . . ." *United States v. Sales*, 22 M.J. 305, 308 (C.M.A. 1986). *See also United States v. Suzuki*, 20 M.J. 248, 249 (C.M.A. 1985). We are able to do so in this case. Absent the instructional error, we are satisfied beyond a reasonable doubt that the adjudged sentence would have at least included a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. We also find this sentence to be appropriate.

Conclusion

The approved findings, as adjudged, and the sentence, as reassessed, are correct in law and fact, and no additional 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, we affirm the findings and only so much of the adjudged sentence as provides for a bad conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

OFFICIAL

JEFFREY L. NESTER
Clerk of Court