UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL V. MARTINEZ
United States Air Force

ACM S31080

02 January 2008

Sentence adjudged 7 March 2006 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: James B. Roan.

Approved sentence: Bad-conduct discharge, confinement for 90 days, forfeiture of $849.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Captain Griffin S. Dunham, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Kimani R. Eason.

Before

WISE, BRAND, and HEIMANN
Appellate Military Judges

PER CURIAM:

Consistent with his plea, the appellant was convicted in a special court-martial of a single specification of divers use of methamphetamines in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sentenced him to a bad-conduct discharge, confinement for 90 days, forfeiture of $849.00 pay per month for 3 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant asserts the following three errors:

I. WHETHER APPELLANT IS ENTITLED TO MEANINGFUL RELIEF WHEN HE SUBMITTED CLEMENCY MATTERS FOR THE

CONVENING AUTHORITY'S REVIEW, BUT THERE IS NO EVIDENCE THAT THE CONVENING AUTHORITY KNEW OF HIS DUTY TO REVIEW THE SUBMISSIONS OR ACTUALLY CONSIDERED THE SUBMISSION.

II. WHETHER THE MILITARY JUDGE COMMITTED PLAIN ERROR BY REMOVING THE MEMBERS' SENTENCING DISCRETION WHEN HE DESIGNATED THE LOCATION FOR AN ADJUDGED RESTRICTION TO THE LIMITS OF DAVIS-MONTHAN AIR FORCE BASE ON THE SENTENCING WORKSHEET.

III. WHETHER THE MILITARY JUDGE ABUSED HIS DISCRETION WHEN HE DENIED APPELLANT'S CHALLENGE FOR CAUSE AGAINST A MEMBER THAT STATED A SENTENCE TO NO PUNISHMENT WAS NOT AN OPTION AND THAT "THERE'S NO ROOM IN MY AIR FORCE FOR PEOPLE THAT ABUSE DRUGS."

We have reviewed the record of trial, the assignment of errors alleged, and the government's response. Finding no error materially prejudicial to the substantial rights of the appellant, we affirm his conviction and sentence.

Convening Authority's Review of Clemency Submission

The appellant claims on appeal that the convening authority's action must be set aside because the record does not reflect that the convening authority reviewed the appellant's clemency submissions prior to taking action. Prior to taking final action, the convening authority must consider matters submitted by the accused under Rule for Courts-Martial (R.C.M.) 1105. R.C.M. 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 324-25 (C.M.A. 1989). We review post-trial processing issues de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)).

When the clemency package was presented to the convening authority, he was not advised in writing that he must consider the clemency submission prior to action. There was no addendum to the Staff Judge Advocate (SJA) recommendation. *See United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990) (en banc). The lack of an addendum advising the convening authority of his obligations could have been overcome if the convening authority had initialed each page of the defense's clemency submission. In this case, however, the convening authority only signed one item, his denial of the appellant's request for the Return to Duty Program (RTDP).

Subsequent to the appellant's allegations of error, the government obtained an affidavit from the SJA to the convening authority indicating that he had verbally briefed

the convening authority in person regarding the convening authority's obligation to consider all the defense's clemency matters. The SJA's affidavit also provided examples of specific facts regarding the appellant's submission that he discussed with the convening authority. Considering the specificity of the affidavit, coupled with the convening authority's signature denying the Return to Duty request, we find as a matter of fact that the convening authority properly considered all the defense's submissions. *See United States v. Crawford*, 34 M.J. 758 (A.F.C.M.R. 1992). Therefore we deny the appellant's claim for relief.

Designation of Restriction Limits on the Sentencing Worksheet

Prior to deliberation on sentencing, the prosecution prepared and offered a sentencing worksheet to assist the court members in putting their sentence in the proper form. The worksheet expressly indicated that if restricted, the appellant would "be restricted to the limits of Davis-Monthan AFB." The worksheet was offered and admitted without objections by either party or questioning by the military judge. During the sentencing instructions, however, the military judge properly instructed the members that "the court [must] specify the limits of the restriction and the period it is to run." The military judge also provided the members a written copy of his oral instructions for their use during deliberations. Finally, neither party recommended or mentioned restriction as a viable sentencing option in sentencing argument before the panel. The panel's sentence did not include restrictions of any type.

On appeal the appellant contends, for the first time, the military judge committed plain error by removing the members' sentencing discretion when the sentencing worksheet expressly specified that any adjudged restriction would be to the limits of Davis-Monthan Air Force Base (AFB). The appellant, citing *United States v. Weatherford*, 42 C.M.R. 26 (C.M.A. 1970), asserts that by specifying the limits of restrictions to Davis-Monthan AFB the appellant was not afforded "individualized sentencing" which prejudiced the appellant because the worksheet "effectively . . . foreclosed from the members' consideration" lesser forms of restraint in lieu of confinement.

We first conclude that the worksheet constitutes additional "instruction" to the members and thus is subject to the same standards of review as sentencing instructional errors. When trial defense counsel fails to object to a sentencing instruction at the time of trial, such failure "constitutes waiver of the objection in the absence of plain error." R.C.M. 1005(f). The waiver rule is inapplicable to failure to object to mandatory instructions. *United States v. Miller*, 58 M.J. 266, 270 (C.A.A.F. 2003).

Here the instructional error was not an error related to those instructions that are mandatory under R.C.M. 1005(e). *See Miller*, 58 M.J. 266 (holding instructions on the time served in pretrial confinement to be mandatory); *United States v. Brandolini*, 13

M.J. 163 (C.M.A. 1982) (omission of no punishment option from a sentence worksheet not prejudicial in light of sentence instructions actually given and contents of worksheet).

Therefore, agreeing with the appellant that a plain error analysis applies, the appellant must demonstrate that; "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (quoting *Kho*, 54 M.J. at 65). As for the final element, this court will look to see if the instructional error "had an unfair prejudicial impact on the jury's deliberations." *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986) (citing *United States v. Young*, 470 U.S. 1, 16 n.14. (1985).

While we agree the worksheet was in error and this error was obvious, the appellant has failed to show the error materially prejudiced the appellant. Neither trial nor defense counsel questioned the members on restriction during voir dire and neither recommended restriction of any type in their sentencing argument. In fact, the defense essentially conceded some confinement was appropriate in an effort to avoid a punitive discharge. Clearly, there is no evidence that the erroneous worksheet impacted the panel's deliberation on sentencing. There being no showing of prejudice we find the faulty worksheet to be harmless error.

Challenge for Cause

Finally, the appellant contends the military judge abused his discretion when he denied the appellant's challenge for cause against the panel's president when he stated a sentence to "no punishment" was not an option for a convicted drug user and "there's no room in my Air Force for people that abuse drugs."

Background

Prior to voir dire, the court panel consisted of eight officers; a lieutenant colonel, three majors, and four captains. During preliminary sessions, the members were advised that the appellant had pled guilty to divers uses of methamphetamines during a 60-day period. When questioned by the military judge, the entire panel agreed that they had no "predisposition toward a sentence" simply because the offense involved the use of methamphetamines. Finally, they all agreed to consider all of the evidence and refrain from making up their minds until they had the opportunity to hear argument.

During the trial defense counsel's voir dire, the following relevant exchanges took place:

> DC: Does anyone on the panel hold a moral or maybe a philosophical or perhaps a religious belief against drug use so much that they would be biased against Airman Martinez in coming to a sentence today?

DC: That's a negative response from all members.

DC: I guess – [Lt Col D] – I sensed a little bit of hesitation. I don't want my question to be confusing, so I just want to clarify with you that you wouldn't have any moral or philosophical or religious conviction.

[Lt Col D]: No – just as an ex-squadron commander – former squadron commander – I mean – my guideline has always been that there's no room in my Air Force for people that abuse drugs – you know – violate the articles and law that we have set forth.

. . . .

DC: This might be going back to what [Lt Col D] had mentioned, but the next question for everyone is – does anyone on the panel have such strong feelings – either based on professional life or personal life – that you will not be able to sit impartially on the court, or you feel that this drug crime deserves a certain type of punishment?

DC: That's a negative response from all members.

Many questions later, trial defense counsel asked one of the members if he could consider "no punishment" in this case. The member replied, "No." The following exchange then occurred:

DC: [Lt Col D], your thoughts on that? One of the options for the court – it'll say on the sentencing worksheet - there's an option for no punishment. I'm just kind of throwing this out there – just to see what your thoughts on it are – but is no punishment an option for you to consider in a case such as this?

[Lt Col D]: No.

DC: Why is that sir, sir?

[Lt Col D]: For basically the same reasons as Major [H] has already stated. He used the drug. He admitted he used it. He obviously knew it was wrong and came forward with his guilt, and there has to be punishment for it.

DC: So, that couldn't be a consideration.

[Lt Col D]: No punishment?

DC: Right

[Lt Col D]: No

At that point, the military judge interrupted the trial defense counsel's voir dire of the members. The military judge instructed the members as follows:

> MJ: You don't have to come to a decision in your mind – after you've deliberated – to no punishment based on this question. Legally, the only thing you have to do is be able to consider it as an option – to weigh it against the evidence and the law and instructions as I give them to you – to be willing to say that – I will consider whether no punishment is appropriate in this case. Whether you ultimately come out with that decision is completely up to you – it's just – I need to know whether you are so predisposed that – I will consider nothing in the possibility of no punishment – that you can't sit impartially in this trial. You may ultimately decide – in your own mind – that no punishment is not appropriate – if that's what you think is the right answer – but I just need to know whether you will or will not consider the evidence – and consider the possibility of no punishment.
>
> [Maj H]: So, it's an open-mind issue?
>
> MJ: It's an open-mind issue.
>
> [Maj H]: I can keep an open mind.
>
> [Lt Col D]: Yes I can do that.

After this answer the Military judge then asked the members, in a lengthy question essentially, if they would "consider the evidence" in coming up with "an appropriate punishment." All the members agreed that they could and would do as instructed. Then, prior to individual voir dire, all of the members agreed with trial defense counsel that they all understood that "a bad-conduct discharge is punishment and not just a separation versus retention or discharge decision."

During individual voir dire of Lt Col D, both the trial counsel and the military judge asked relevant follow-on questions regarding any potential bias he may have about punishment options.

> TC: Just based on that incident [prior drug allegation in his unit] and any other – again – previous experience you might have – are you willing to

keep an open mind in these proceedings – that you could determine a sentence of anywhere from no punishment to the maximum sentence?

[Lt Col D]: Oh, yes – definitely

Finally, the military judge had this exchange with Lt Col D:

MJ: I believe you said – in response to a question that was asked of you by counsel – you said something to the effect of – no room for people in the Air Force – or – there was no room in the Air Force for people who may have used drugs?

[Lt Col D]: In my Air Force – is what I believe I answered.

MJ: - In your Air Force – okay. Again, as I've mentioned before – a couple of times now – one area that I can't allow a member to sit on is if they have that inelastic predisposition, so if you've already made up your mind that – because Airman Martinez was convicted of using meth, which, in fact, has happened, that he automatically must be discharged from the Air Force because you don't have room in the Air Force for that type of conduct, I need to know about it –

[Lt Col D]: All right, sir.

MJ: - so, is that the case? Have you already made up your mind that he must automatically be discharged?

[Lt Col D]: No, I think – what I – what I was probably more alluding to in my response on that was – more of – okay – he's guilty – I mean – he's done it – all right? So, there has to be a punishment to fit the crime – whatever that case may be. Now, he's guilty to his use – hear all the evidence – and we'll weigh it from no punishment to the max. I can do that, but something has to be done. We're going through the process, so that's the part that has to be done, and – I guess – that was more where my response was being directed –

MJ: Okay.

[Lt Col D]: - we just can't say – okay he's a great kid – you know – whew – we'll let him go – no, we've got to – something has to be done, and that's the process which we're going though now.

MJ: Okay, so just to make sure I understand your position, it's – there's no requirement – as you sit here today – that he has to be punitively discharge, it's simply – in your mind – that something had to happen as a result of using that – and the forum chosen was a court-martial?

[Lt Col D]: Yes, sir

MJ: Okay. Very well.

The trial defense counsel did not ask Lt Col D any questions about punishment options during individual voir dire.

Military Judge's Ruling

After voir dire, the military judge asked trial defense counsel if there were any challenges for cause. The following exchange took place:

DC: Sir, the defense would challenge for cause – [Lt Col D] – especially – even though you tried to get him to explain his comment about no room for drugs in the Air Force and people who use drugs and that – mixed in with a lot of the – I think there's implied bias there, sir. Even if we tried to explain the actual bias, he still didn't have a good explanation for that statement – there's no room for drugs in the Air Force. He was very confident – very aggressive – in that statement – as well as other statements that he made, and I just think that that goes more or less to implied bias, and he just didn't give a good explanation for what he said.

MJ: Okay. Well, I don't believe that there's any basis for challenge for cause. I believe his comment was sufficient – in my mind – to indicate that he had not made up his mind that – in fact, said so – there was no requirement that Airman Martinez be automatically discharged – receive a punitive discharge for the use of drugs – and, so I'm convinced that he does not have a predisposition or inelastic disposition toward any type of punishment in this case. I think I asked them that several times – all members – to include [Lt Col D] – but also in individual voir dire – which – he indicated that he has not made up his mind and will consider everything. And, that's all you can ask of any member. I took it from his comment that – there's no place for drugs – simply means – that something has to be done if somebody's found to have used drugs – whatever route that may be – from administrative, nonjudicial – perhaps, or a court-martial. So I don't find there's a basis for a challenge for cause.

Discussion

R.C.M. 912(f)(1)(N) requires removal of a court member for cause when it is "in the interest of having the court-martial free from substantial doubt as to legality, fairness and impartiality." Our superior court has interpreted this mandate to encompass two separate legal tests: actual and implied bias. *United States v. Strand*, 59 M.J. 455, 458 (C.A.A.F. 2004). Actual bias exists when, for example, a member has a "decidedly friendly or hostile attitude toward a party; or has an inelastic opinion concerning an appropriate sentence for the offense charged." R.C.M. 912(f)(1), Discussion. Implied bias exists when, in the eyes of the public, leaving the member on the panel will do injury to the "perception of appearance of fairness in the military justice system." *United States v. Terry*, 64 M.J. 295, 302 (C.A.A.F. 2007). Determinations of member bias, whether actual or implied, are based on the totality of the surrounding circumstances, with due recognition that "challenges for cause are to be liberally granted." *Id.* "Challenges based on implied bias and the liberal grant mandate address historic concerns about the real *and* perceived potential for command influence on members' deliberations." *United States v. Clay*, 64 M.J. 274, 276-77 (C.A.A.F. 2007) (emphasis added).

On appeal, a military judge's denial of challenges based on actual bias are afforded deference. These challenges are "essentially one of credibility" as "the military judge has an opportunity to observe the demeanor of court members and assess their credibility during voir dire." *United States v. Daulton*, 45 M.J. 212, 217 (C.A.A.F. 1996).

Applying this standard, we find the military judge did not error in denying the challenge on a claim of actual bias. Lt Col D clearly demonstrated to the military judge that he would consider the evidence and maintain an open mind regarding all of the punishment options. It is also significant that Lt Col D never claimed that all drug usage warrants a punitive discharge. He simply indicated that he has concerns with keeping drug users in "[his] Air Force." Such a sentiment from a career officer is not evidence of actual bias when that same officer agrees to consider all of the evidence and all of the punishment options. *See United States v. Bannwarth*, 36 M.J. 265 (C.M.A. 1993); *United States v. McLaren*, 38 M.J. 112 (C.M.A. 1993).

Contrary to claims of actual bias, a military judge's denial of challenges based on implied bias, on appeal, are afforded less deference than a ruling on actual bias, because of the objective nature of the standard. *United States v. Rome*, 47 M.J. 467, 469 (C.A.A.F. 1998). Further, this limited deference will only be applied when the military judge indicates on the record an accurate understanding of the law and its application to the relevant facts. *United States v. Downing*, 56 M.J. 419, 422 (C.A.A.F. 2002); *United States v. Briggs*, 64 M.J. 285, 286-87 (C.A.A.F. 2007). In this case the military judge did not articulate for the record his understanding of the law, particularly the liberal grant standard, and therefore his ruling is entitled to no deference.

Therefore we review of this challenge for cause based upon a claim of implied bias de novo. At trial, the trial defense counsel did not squarely articulate the bases for the claim of implied bias. It appears the appellant's argument rests on Lt Col D's comment that he does not want drug users in his Air Force, thus creating an implied bias. On appeal, the appellant argues that the bias arises out of the "no room" in the Air Force comments and the fact that he said he could not consider "no punishment." Both of these comments are answers that demonstrate a level of candor that we want and encourage from court members so that both parties can effectively use their peremptory challenges. Clearly, candor by members does not undermine the public's perception of the fairness in the military justice system.* Moving beyond the candor in the answer, we have a member who admitted in voir dire that he is concerned about keeping drug users in the Air Force and believes that a person should be punished for their crimes. Neither of these answers conflict with a commitment to consider the evidence and all of the punishment options. They also do not conflict with a view that they can be fair, maybe tough, but still fair.

Lt Col D's comments demonstrate a level of professional commitment to the unique requirements of military service and the importance of good order and discipline in the military. These qualities alone neither create a perception of unlawful command influence nor serve as a basis for an assertion of implied bias. The trial defense counsel did not meet their burden of showing why Lt Col D should be excused for cause. Therefore we find the military judge did not error in denying the challenge for cause against Lt Col D.

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, GS-11, DAF
Clerk of the Court

* Lt Col D's answers are also not surprising when you consider the criteria for selecting members under Article 25(d)(2), UCMJ, 10 U.S.C. § 825(d)(2).