UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MELISSA A.T. MASUCCI
United States Air Force

ACM S31874

09 May 2012

Sentence adjudged 30 August 2010 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: David S. Castro.

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford and Captain Luke D. Wilson.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major Charles G. Warren; Captain Brian C. Mason; and Gerald R. Bruce, Esquire.

Before

ORR, GREGORY, and WEISS
Appellate Military Judges

PER CURIAM:

A special court-martial composed of officer members convicted the appellant in accordance with her pleas of use and distribution of ecstasy, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court sentenced her to a bad-conduct discharge, confinement for 2 months, and reduction to the grade of E-1. The convening authority approved the sentence adjudged and waived automatic forfeitures for the benefit of the appellant's dependent child. The appellant assigns as error that the military judge erred by taking judicial notice of certain characteristics of ecstasy based on a learned treatise.

The appellant admitted during the plea inquiry that she used ecstasy at rave parties on about five separate occasions and distributed ecstasy "a couple" of times to her boyfriend. As part of his sentencing case, trial counsel asked the military judge to take judicial notice of certain characteristics and potential effects of ecstasy as described in a learned treatise[*] submitted in support of his request. The military judge found that the supporting document was a proper treatise but that he would take judicial notice of only limited sections related to the appellant's case.

Citing Mil. R. Evid. 403, defense counsel objected not on the basis of improper judicial notice but that the probative value of the information was substantially outweighed by the danger of unfair prejudice in that the information would mislead the members "regarding the dangers of ecstasy." The military judge conducted the required balancing test under Mil. R. Evid. 403, finding that his redaction of substantial portions of the proposed information as well as a limiting instruction would remove the danger of unfair prejudice and confusion of the issues.

Drawing from the treatise, the military judge provided brief information on ecstasy in his sentencing instructions that included its chemical composition, usual dosage, and possible effects of use and over-dosage. He further instructed that these effects may or may not have been present in the appellant's case. Finally, he advised the members that they may but are not required to accept as conclusive any matter judicially noticed.

We test the admission or exclusion of evidence in sentencing using an abuse of discretion standard, and any error in sentencing must materially prejudice the substantial rights of the appellant before the sentence will be found incorrect based on error. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009). Regardless of plea, trial counsel in sentencing may offer evidence "as to any aggravating circumstances *directly relating to or resulting from the offenses* of which the accused has been found guilty." Rule for Courts-Martial (R.C.M.) 1001(b)(4) (emphasis added); *see also United States v. Vickers*, 13 M.J. 403 (C.M.A. 1982). Although the relationship to the appellant's offenses must be direct, impact evidence can include prospective impact as well. *See for example United States v. Stark*, 30 M.J. 328 (C.M.A. 1990) (expert testimony that two child victims of sexual abuse were at a higher risk of suffering from long-term effects of the abuse). Whether a circumstance is directly related to an offense for purposes of aggravation requires "considered judgment by the military judge," and the exercise of that judgment will not be overturned lightly. *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997). Sentencing evidence is subject to the balancing requirements of Mil. R. Evid. 403, and, when the military judge conducts a proper balancing test under that rule on the record, the ruling "will not be overturned absent a clear abuse of discretion." *Stephens*, 67 M.J. at 235.

[*] Randall C. Baselt, *Disposition of Toxic Drugs and Chemicals in Man* (5th ed. 1999).

We find that the military judge did not abuse his discretion in admitting the limited evidence of the characteristics and effects of ecstasy in this prosecution for use and distribution of ecstasy. In a prosecution involving illegal drugs, evidence on the history, nature, and effects of the illegal drug involved is a proper sentencing consideration: "To hold otherwise would require the trier-of-fact to operate in a vacuum and be insulated from the reality of the drug epidemic in our society." *United States v. Needham*, 23 M.J. 383, 384 (C.M.A. 1987). The military judge properly conducted the required balancing test, deleted significant portions of the requested information, provided the information to the members in oral form only, and provided a correct limiting instruction on the use of the information. *See id.* at 385.

Although at trial the appellant objected only on the basis of Mil. R. Evid. 403 and did not dispute that the facts could be judicially noticed, he argues on appeal that the military judge erred by taking judicial notice of the information from a learned treatise. Given the defense counsel's limited objection at trial, we find the issue waived. *See United States v. Campos*, 67 M.J. 330 (C.A.A.F. 2009). Even assuming the issue was not waived, we do not find per se error in using a learned treatise as a source for judicially noticed facts. In *Needham*, the military judge took judicial notice of information about illegal drugs from a Drug Enforcement Administration magazine. *Needham*, 23 M.J. at 384. The Court expressed "some doubt" whether that was a proper source for judicial notice "*as compared to a learned treatise*." *Id*. at 385 (emphasis added). Here, the military judge found the source document "a proper treatise." As in *Needham*, defense counsel did not dispute the accuracy of the information or the status of the source as a learned treatise but, as discussed above, focused his objection on unfair prejudice. Under the circumstances of this case, we find that the military judge did not abuse his discretion in using a learned treatise as the source for judicial notice of facts relating to the illegal drug which the appellant was convicted of using and distributing.

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 the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court