UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic SHAYNE M. MCGOVERN
United States Air Force

ACM S31468

15 December 2008

Sentence adjudged 21 February 2008 by SPCM convened at McGuire Air Force Base, New Jersey. Military Judge: Paula B. McCarron (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 125 days.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major David P. Bennett, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

HEIMANN, Senior Judge:

The appellant was tried at McGuire Air Force Base, New Jersey before a military judge alone. Consistent with his pleas, he was convicted of divers uses of cocaine and of breaking restrictions. The charges were in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934, respectively. The adjudged sentence consisted of a bad-conduct discharge and 135 days of confinement. The convening authority approved the punitive discharge and only 125 days of confinement. The appellant raises one issue on appeal. He claims the military judge erred when she considered improper "rehabilitation" evidence.

During the sentencing phase, the trial counsel called a security forces noncommissioned officer to testify about drug treatment programs that were available at the local confinement facilities. The trial defense counsel immediately objected and argued to the military judge that the evidence was not proper sentencing evidence under Rule for Courts-Martial (R.C.M.) 1001. The testimony was offered, according to trial counsel, to advise the court of "the treatment options that will be available to the accused should he be sentenced to confinement . . . and that goes to rehabilitative potential which is one of the five sentencing guidelines under the RCM." When pressed by the military judge, the trial counsel argued that the existence of the programs showed the rehabilitative benefits of confinement. Despite two more objections by the defense counsel, the military judge allowed the testimony and permitted the facts to be argued by the trial counsel in his sentencing argument. This was error.[1]

It is well settled that the availability of treatment programs is a collateral matter that should not be presented in aggravation for consideration in determining a proper sentence, unless presented in rebuttal. *See United States v. Flynn*, 28 M.J. 218 (C.M.A. 1989) (permissible for military judge to take judicial notice of confinement facilities' sex offender rehabilitation programs after defense counsel suggested incarceration of sex offenders not appropriate); *United States v. Lapeer*, 28 M.J. 189 (C.M.A. 1989) (permissible for trial counsel to cross examine a defense witness on sex offender rehabilitation programs after the defense witness had opined that confinement was inappropriate for accused convicted of sex offense); *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988) (accused "should be sentenced without regard" for collateral consequences of sentence); *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988) (not error for military judge to instruct members on collateral consequences of sentence if accused agrees); *United States v. Pollard*, 34 M.J. 1008 (A.C.M.R. 1992), *rev'd on other grounds*, 38 M.J. 41 (C.M.A. 1993) (sex offender rehabilitation program information not appropriate matter in aggravation). The appellant offered no sentencing evidence that would have made this testimony proper, even if offered in rebuttal.

Having found error, we must assess the impact of the error. We test the erroneous admission or exclusion of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence. *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001) (citing *Kotteakos v. United States*, 328 U.S. 750, 765 (1946)). If it did substantially influence the adjudged sentence, then the result is material prejudice to the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *see also United States v. Chambers*, NMCCA 200500329 (N.M. Ct. Crim. App. 3 Aug 2006) (unpub. op.). When determining whether evidence presented in sentencing was unduly prejudicial, we apply the following four-pronged analysis formulated in *United States v.*

[1] We review the judge's decision to admit or exclude sentencing evidence under a clear abuse of discretion standard. *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999). A ruling based upon an erroneous view of the law constitutes an abuse of discretion. *United States v. Griggs*, 61 M.J. 402, 406 (C.A.A.F. 2005).

Weeks, 20 M.J. 22, 25 (C.M.A. 1985): (1) the strength of the government's case; (2) the defense theory; (3) the materiality of the evidence; and (4) the quality of the evidence. *United States v. Latorre*, 53 M.J. 179, 182 (C.A.A.F. 2000).[2]

When we look to the prosecution's sentencing case, it is clear the prosecution considered the existence of drug rehabilitation at the confinement facilities as an important component of their sentencing case. Due to the military judge's express ruling in admitting the evidence, we are compelled to conclude that she improperly considered the information in determining the proper amount of confinement. In light of this error, we conclude this evidence played a substantial role in the military judge's deliberations on a sentence.

Having determined that the admission of the evidence was prejudicial error, we must decide whether to reassess the sentence or remand the case for a sentence rehearing. We conclude that we can reassess the sentence in accordance with *United States v. Sales*, 22 M.J. 305, 307-08 (C.M.A. 1986). In doing so, we only approve 100 days of confinement and the bad-conduct discharge.

Conclusion

The findings, as approved, and the sentence, as reassessed, 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).

---

[2] Although *United States v. Weeks*, 20 M.J. 22 (C.M.A. 1985) established this test for evidence presented on the issue of guilt or innocence, our superior court adopted this test in *United States v. Latorre*, 53 M.J. 179 (C.A.A.F. 2000) for evidence presented in sentencing as well. In evaluating these criteria we do note the alternative four-pronged analysis proposed by Judge Crawford in her dissent in *Griggs*:

> (1) the probative value and weight of the evidence . . . ; (2) the importance of the evidence in light of other sentencing considerations; (3) the danger of unfair prejudice resulting from the evidentiary ruling; and (4) the sentence actually imposed, compared to the maximum and to the sentence the trial counsel argued for.

Griggs, 61 M.J. at 413 (Crawford, J., dissenting) (citing *United States v. Saferite*, 59 M.J. 270, 274-75 (C.A.A.F. 2004)).

Accordingly, the findings, as approved, and the sentence, as reassessed, are

AFFIRMED.

OFFICIAL

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