UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CJ H. MCKEAGUE
United States Air Force

ACM S31187

24 September 2007

Sentence adjudged 19 September 2006 by SPCM convened at Hickam Air Force Base, Hawaii. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Vicki A. Belleau, and Captain Matthew C. Hoyer.

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

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of dereliction of duty and wrongful use of methamphetamine on divers occasions in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. The court-martial sentenced the appellant to a bad-conduct discharge, confinement for 8 months, and reduction to E-1. Pursuant to a pretrial agreement, the convening authority approved only so much of the sentence that provided for a bad-conduct discharge, confinement for 6 months, and reduction to E-1.

On appeal, the appellant contends that the military judge erred when he allowed the trial counsel to elicit testimony during presentencing that was not directly related to, or resulting from, the charged offenses.

Background

The trial counsel made a motion to have the military judge take judicial notice that fatigue is a withdrawal symptom associated with the use of methamphetamine. The motion was supported by several pages of information obtained from various sources, including the Drug Enforcement Administration and the Office of National Drug Control Policy. The trial defense counsel did not object and the military judge granted the motion. The trial counsel called TSgt E, the appellant's supervisor in the video teleconference (VTC) facility at Hickam Air Force Base, Hawaii, where the appellant worked during the time he admitted to using methamphetamine. TSgt E explained that the function of the VTC facility was to provide video and audio connections to senior leaders, including general officers, so they could communicate with sites around the world. TSgt E noted that the duty hours in the section fluctuated greatly, and members of the section could be called into the office at all hours on short notice, including weekends. TSgt E testified that from 1 April 2006 to 17 May 2006, he observed the appellant sleeping on duty seven times. TSgt E further testified that because the VTC facility was a two-person shop, his own workload increased because of the appellant's unreliability. The trial defense counsel did not object to TSgt E's testimony or to the trial counsel's argument based in part on that testimony.

Analysis

Since the appellant did not object at trial, we review for plain error. In reviewing for plain error, we examine: (1) Whether there was an error; (2) If so, whether the error was plain or obvious; and (3) If the appellant has suffered material prejudice to a substantial right. *United States v. Boyd*, 52 M.J. 758, 761 (A.F. Ct. Crim. App. 2000) (citing *United States v. Olano*, 507 U.S. 725, 732-34 (1993)); *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F 1998). *See also* Article 59(a), UCMJ, 10 U.S.C. § 859(a). Under plain error analysis, the appellant has the burden of persuading this Court that there was plain error. *Powell*, 49 M.J. at 464-65.

We find the admission of TSgt E's testimony and the trial counsel's reference to it in his argument was not error, much less plain error. Pursuant to Rule for Courts-Martial 1001(b)(4), the trial counsel may present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty. "Evidence in aggravation includes, but is not limited to, evidence of . . . significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." *Id.* Given the military judge's judicial notice of fatigue and its relationship to methamphetamine use, it is a

reasonable inference that the appellant's chronic sleepiness was caused by his unlawful drug use. As TSgt E noted, the appellant's condition did cause a detrimental impact on the discipline and efficiency of the command because TSgt E had to work longer.

Even if it was error to admit TSgt E's testimony, the appellant has failed to establish any material prejudice to his substantial rights. While the appellant objects to the testimony of TSgt E, additional evidence of the appellant's chronic on-duty sleeping was properly before the military judge in Prosecution Exhibit 5, the appellant's performance report. The appellant has not shown how the outcome of his case would have been different if the testimony had been excluded, especially given that the sentencing was done by a military judge sitting alone. *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006). The appellant also fails to show how he was materially prejudiced when he received the benefit of a pretrial agreement which limited his maximum confinement to 6 months, regardless of the sentence adjudged by the court. *Id.*

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 Court