UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class WILLIAM W. MORRIS
United States Air Force

ACM S30588

28 October 2005

Sentence adjudged 10 February 2004 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Steven B. Thompson.

Approved sentence: Bad-conduct discharge, confinement for 3 months, forfeiture of $795.00 pay per month for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, and Captain Christopher S. Morgan.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Robert V. Combs, and Captain C. Taylor Smith.

Before

BROWN, MOODY, and FINCHER
Appellate Military Judges

PER CURIAM:

We have examined the record of trial, the assignments of error, and the government's answer. The appellant asks us to set aside the findings in Specification 2 of the Charge, wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a, because the military judge failed to sua sponte instruct the members on the issue of entrapment as it pertained to the use of cocaine between 18 and 25 October 2003. He also asks us to find his sentence inappropriately severe. We find the military judge did not commit plain error in failing to include the October cocaine use in his entrapment instructions. We also find the sentence appropriate and affirm the findings and the sentence.

From March though June of 2003, the Air Force Office of Special Investigations (AFOSI) used Airman Basic (AB) Jonathan White as a confidential informant to ferret out drug use on Lackland Air Force Base (AFB). AB White wanted the AFOSI's help in escaping the consequences of a previous absent without leave offense, in violation of Article 86, UCMJ, 10 U.S.C. § 886, so he had an incentive to help them.

During the course of his undercover work, AB White became acquainted with the appellant. The appellant confided to AB White that he had a cocaine problem and wanted to quit. AB White suggested that he seek help from the Alcohol, Drug Abuse Prevention and Treatment Program at Lackland AFB. The appellant did so. In the meantime, the AFOSI told AB White to ask the appellant if he would supply him with cocaine.

At first, the appellant refused AB White's requests. He told AB White he was done with drugs and did not want to get cocaine for him. AB White repeatedly approached the appellant, asking for cocaine and encouraging him to use cocaine. After about 15 requests, the appellant relented and bought cocaine for AB White.

By June 2003, AB White had become a liability to the AFOSI. He was out of control, using and distributing illegal drugs without authority. As a result, the AFOSI terminated their relationship with him in June 2003.

On 25 October 2003, the appellant provided a urine specimen in response to a random urinalysis. It tested positive for cocaine.

At trial, the military judge instructed the court members on the entrapment defense with regard to wrongful distribution of cocaine and a single use of cocaine in June 2003. He did not give, and the defense did not request, the entrapment instruction regarding the October cocaine use. The appellant now contends the military judge committed plain error and should have sua sponte instructed the members on the entrapment defense for the October use.

Whether the military judge properly advised the court members is a question of law which we review de novo. *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002). At trial, the appellant's trial defense counsel discussed the entrapment instruction with the military judge at some length. He specifically asked the military judge to give the entrapment instruction in connection with the June cocaine use. He did not request the instruction for the cocaine use in October. Because of these actions, the appellant has waived this issue unless the military judge committed plain error. Consequently, the appellant must show: (1) there was error; (2) the error was plain, clear, or obvious; and (3) the error prejudiced the substantial rights of the appellant. *United States v. Carter*, 61 M.J. 30, 33 (C.A.A.F. 2005) (citing *United States v. Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998)); *see also United States v. Olano*, 507 U.S. 725, 732-35 (1993). We find the appellant has failed to meet this burden.

The appellant relies on *Sherman v. United States*, 356 U.S. 369 (1958), to support his claim of plain error. He contends that because AB White induced him into "returning to the habit of use," the October cocaine use demands an entrapment instruction. *Id*. at 376. We disagree.

The *Sherman* facts are similar to the appellant's case. Both cases involved government informants tempting drug offenders undergoing rehabilitation. However, there is a key difference. The *Sherman* case concerned a continuing course of conduct resulting from the government's stratagems. The appellant's case does not. The evidence shows that AB White stopped working for the AFOSI in June. There is no evidence that he continued to tempt the appellant to commit drug offenses after that. In fact, there is no evidence linking the positive urinalysis in October with the activities of AB White. The inducements of AB White in June did not give the appellant "*carte blanche* to commit an infinite number of later offenses." *United States v. Vaughn*, 80 F.3d 549, 552 (D.C. Cir. 1996).

The appellant correctly received the benefit of the entrapment instruction regarding the distribution and use of cocaine in June. His defense counsel did not request the instruction for October. The military judge did not instruct on it sua sponte because it was not "reasonably raised by the evidence." *McDonald*, 57 M.J. at 20 (citing Rule for Courts-Martial 920(e)). We find that the appellant has failed to show the military judge erred in delivering his instructions.

We have also considered the appellant's claim that his sentence was inappropriately severe. Having thoroughly examined the entire record, including the nature of the offense, the appellant's military record, and any extenuating and mitigating factors, we find the sentence appropriate. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); Article 66(c), UCMJ, 10 U.S.C. § 866(c).

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court