UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman THUYET H. NGUYEN
United States Air Force

ACM 35323

26 March 2004

Sentence adjudged 8 January 2002 by GCM convened at Edwards Air Force Base, California. Military Judge: Mark Ruppert.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Karen L. Hecker, and Major Jefferson B. Brown.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Shannon J. Kennedy.

Before

STONE, MOODY, and JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification each of fraudulent enlistment and wrongful use of cocaine, in violation of Articles 83 and 112a, UCMJ, 10 U.S.C. §§ 883, 912a. The general court-martial, composed of officer and enlisted members, sentenced the appellant to a bad-conduct discharge, confinement for 4 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant raises one assignment of error. He contends that the military judge's sentencing instructions misled the members as to the possibility of the appellant's receiving an administrative discharge and erroneously informed the members they could disregard comments in the appellant's unsworn statement concerning that issue. Finding no error, we affirm.

I. Background

The appellant was assigned to the 95th Mission Support Squadron at Edwards Air Force Base, California. On 9 October 2001, the appellant submitted a urine sample, as part of a random sweep of his unit, which ultimately yielded a positive result for cocaine. When interviewed, the appellant admitted he used cocaine at his parents' house about two days prior to submitting the urine sample. He also admitted he ingested cocaine prior to entering the Air Force. The appellant had not revealed this prior drug use when he applied for enlistment. These events formed the basis for the charges and specifications.

During the sentencing phase of the trial, the appellant made an unsworn statement. In this statement he talked about his background, the highlights of his military career, and family problems underlying his drug use. He also made the following statement:

> I know that my actions require some punishment. I also understand that even if I do not receive a bad conduct discharge, I will likely receive an administrative discharge after this trial. I do not want to go to jail, but instead would rather try to continue to be a productive member of the Air Force or society. More than anything, I do not want a punitive discharge.

Prior to instructing the members, the military judge gave counsel for each side a copy of his proposed instructions. The defense counsel stated that he did not object to the instructions. These instructions contained the following information concerning the appellant's reference to an administrative discharge:

> In his unsworn statement the accused did make reference to the possibility of an administrative discharge. An unsworn statement is an appropriate means to bring information to your attention, and must be given the consideration it is due. However, as a general evidentiary matter, evidence regarding administrative discharges is irrelevant and inadmissible outside the context of an unsworn statement. This is so because of the following reasons: One, you have no power to initiate or adjudge an administrative discharge. Two, as to a discharge, as I've already instructed you, the only issue before you is whether the accused's sentence should include a dishonorable discharge, a bad conduct discharge, or no punitive discharge. Three, even if the accused's commander were to initiate an administrative discharge, that officer has no power to approve, [or] execute such a discharge. Thus, to consider the possibility of an administrative discharge or its propriety does result in speculation about matters beyond your control and discretion. And finally, the decision whether or not to initiate an administrative, and if initiated, to approve such a discharge, is based on a wholly different set of criteria than the criteria that apply in deciding

> whether to adjudge a punitive discharge. You are advised as to the criteria for adjudging either a bad conduct or a dishonorable discharge. Again, the administrative discharge process is simply not before you. In short, use of this limited information provided by the accused in his unsworn statement regarding the administrative discharge process is fraught with problems. Therefore, after due consideration of the unsworn statement and my prior instruction on the nature of an unsworn statement, you should consider yourselves at liberty to disregard any reference to the administrative discharge. The consideration and weight you give this reference is up to you in your sound discretion.

It is this instruction that forms the basis of the assignment of error.

II. Analysis

This court reviews sentencing instructions for an abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002). However, "failure to object to an instruction . . . before the members close to deliberate on the sentence constitutes waiver of the objection in the absence of plain error." Rule for Courts-Martial (R.C.M.) 1005(f). Plain error means error that is plain or obvious and that materially prejudices the substantial rights of the appellant. *United States v. Powell*, 49 M.J. 460, 464 (C.A.A.F. 1998).

We note first of all that the trial defense counsel was provided in advance a copy of the sentencing instructions, which included the portion under consideration here, and stated on the record he did not object. Additionally, after having read the instructions to the members, the military judge asked if counsel for either side objected to the instructions. The trial defense counsel stated, "No, Your Honor." Therefore, we hold that any error has been affirmatively waived. *See Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) ("A waiver is . . . an intentional relinquishment or abandonment of a known right or privilege").

Even absent the waiver, however, we hold that the instruction was not plain error. Military judges have broad discretion concerning instructions on collateral matters. *See United States v. Duncan*, 53 M.J. 494, 499 (C.A.A.F. 2000). Of course, any instructions given must be clear and must not mislead the members. *United States v. Greaves*, 46 M.J. 133 (C.A.A.F. 1997). We find that the instructions given by the military judge in this case were legally correct and were not misleading. The collateral consequences of a sentence, to include a subsequent administrative discharge, are, generally speaking, not relevant to the sentencing authority's decisions. *See United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988). *See also* R.C.M. 1005(e)(4) (members "may not rely on the possibility of any mitigating action by the convening . . . authority" in deciding upon an appropriate sentence); *United States v. Friedmann*, 53 M.J. 800, 801 (A.F. Ct. Crim. App. 2000)

(affirming military judge's sentencing instruction stating, "If you don't conclude the accused should be punitively separated from the service, [then] it is none of your business or concern as to whether anyone else might choose to initiate [administrative discharge] action").

While not denying that an administrative discharge was possible, the military judge advised that such a possibility was beyond the authority of the court members to achieve and that they were to consider only whether or not to impose a punitive discharge. Furthermore, the military judge's statement that the members were free to disregard the reference to an administrative discharge did not foreclose proper consideration of the appellant's unsworn statement. Rather, it struck a balance between upholding the appellant's right of allocution (*see United States v. Grill*, 48 M.J. 131 (C.A.A.F. 1998)) and the legitimate goal of preventing the members from being distracted by matters that were "none of [their] business or concern." *Friedmann*, 53 M.J. at 802. We hold there was no error, much less plain error.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER
Chief Court Administrator