UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic RYAN E. OSWALD
United States Air Force

ACM S31554

25 March 2009

Sentence adjudged 12 August 2008 by SPCM convened at Nellis Air Force Base, Nevada. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge and confinement for 90 days.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Major Brian M. Thompson.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Coretta E. Gray.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

OPINION OF THE COURT

JACKSON, Judge:

Pursuant to his pleas, a military judge found the appellant guilty of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sitting as a special court-martial sentenced the appellant to a bad-conduct discharge and 90 days confinement. The convening authority approved the sentence as adjudged. On appeal the appellant asks this Court to set aside the sentence and order a sentencing rehearing. He asserts that trial counsel's sentencing argument was improper because it: (1) substantially blurred the distinction between a punitive discharge and an administrative separation, and (2) argued that the inadequacy of

previous nonjudicial punishment was an adequate basis upon which to enhance the court-martial punishment. Finding no error, we affirm.*

Background

On 15 May 2008, the appellant was drinking alcohol with two fellow airmen when one of the airmen offered the appellant some cocaine. The appellant took the airman up on his offer and snorted three lines of cocaine. The next day, the appellant was randomly selected for a urinalysis. The appellant submitted a urine sample, the sample was sent to the Air Force Drug Testing Laboratory, and the sample subsequently tested positive for cocaine.

During the presentencing portion of trial, the trial counsel, pursuant to Rule for Courts-Martial 1001(b), admitted, without defense objection, portions of the appellant's service record—namely three records of nonjudicial punishment, one record of vacation of nonjudicial punishment, and one letter of reprimand the appellant received for failing to obey a lawful order, reckless and drunk driving, underage drinking, and damaging government property. During his sentencing argument, the trial counsel made the following statements, "Why it [sic] is a bad conduct discharge appropriate in this case? First of all, he needs to be punished; his uniform needs to be taken away from him. He lost the right to wear the uniform that the men and women wear in Iraq right now. He lost that right when he decided to use cocaine. Take the uniform away from him. Punish him." The trial defense counsel, upon hearing the trial counsel's comments, objected and made the following comments, "Objection, Your Honor. This is not a separation hearing. This is about punishment, not administrative discharge." The military judge overruled the trial defense counsel's objection and informed the parties that the trial counsel's argument was a fair comment on the evidence and that she would be instructing the members shortly.

The trial counsel continued with his argument and made the following statements, "Finally, members our justice system is used to ensure good order and military discipline. . . . Send a message to every airman that if they use cocaine with two other airmen, they will be discharged." The trial defense counsel objected and made the following comments, "Objection, your honor, again. The issue here is not discharge, it's punishment." The military judge sustained the objection and the trial counsel rephrased his argument by advising the members "He [the appellant] will be punitively discharged."

After the trial defense counsel's second objection, the trial counsel continued with his argument and made the following additional statements, "Now, the government is

* Although not affecting the legal sufficiency of the findings or sentence in this case, there are two errors in the court-martial order. It fails to state that the appellant pled guilty to and was found guilty of the Specification of the Charge. Also, the order incorrectly states the appellant was sentenced to confinement for 3 months, when he was sentenced to confinement for 90 days. We order promulgation of a corrected court-martial order.

asking for six months in confinement. The accused has shown that lesser means of rehabilitation will not work through his actions. Let's take a look at the timeline of the accused's prior misconduct. . . . You will be able to look at these Article 15's and this LOR. . . . He has repeatedly shown that he can not [sic] be rehabilitated with lesser means." The trial defense counsel, upon hearing the trial counsel's comments, objected and made the following comments, "Objection, Your Honor. Rehabilitation in this case should go to charged misconduct. This is unrelated, uncharged misconduct; it's not relevant." The military judge overruled the trial defense counsel's objection and informed the parties that the trial counsel's argument was a fair argument and that she would be instructing the members on how to use the evidence.

The last portion of the trial counsel's sentencing argument that is of issue concerns his following statements, "He has repeatedly shown that he cannot follow the rules. Now, it might be argued that this is too severe a punishment, what we are asking for. But members, we ask that you remember; this isn't the first time he's been in trouble." The trial defense counsel objected and argued that the trial counsel was asking the members to punish the appellant more severely because of the appellant's prior misconduct, misconduct for which the appellant had already been punished. The military judge sustained the objection and asked the trial counsel to restate his argument.

The trial counsel concluded his argument with the following statement:

> Now, it's the same old song and dance, members; these are his responses to his past punishment. "It won't happen again." "I have no excuse whatsoever." "It will not happen again." "Give me a second chance." . . . The only thing he has shown with time is that he will continue these patterns of misconduct. Let's take a look at the same old song and dance and some of the statements he said today: "I apologize for my actions." "No excuse." . . . It's the same old song and dance.

Trial Counsel's Sentencing Argument

"The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000) (citing *United States v. Shamberger*, 1 M.J. 377 (C.M.A. 1976); *United States v. Gerlach*, 37 C.M.R. 3 (C.M.A. 1966)). When the trial counsel is arguing for what is perceived to be an appropriate sentence, he is at liberty to strike hard, but not foul, blows. *Id.* (citing *United States v. Edwards*, 35 M.J. 351 (C.M.A. 1992); *Berger v. United States*, 295 U.S. 78 (1935)).

Additionally, it is appropriate for the trial counsel, who is charged with being a zealous advocate for the government, to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *Id.* (citing *United States v.*

Nelson, 1 M.J. 235, 239 (C.M.A. 1975)). However, it would be improper argument for the trial counsel to blur the distinction between administrative discharges and punitive discharges. *United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992) (citing *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989)). To determine if counsel's argument is fair, we must view the argument within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001).

Against this backdrop we find the trial counsel's argument for a punitive discharge, while unartful at times, fair and properly permissible. A review of the trial counsel's entire sentencing argument convinces us that the trial counsel was arguing that the appellant should receive a punitive discharge as punishment for his crimes and was not arguing, as the appellant alleges, simply for a discharge or non-retention. Additionally, we agree with the military judge that the trial counsel's reference to the appellant's "bad paper" was a fair comment on the evidence of record—the appellant's service record—a record that was relevant on the issue of the appellant's rehabilitative potential.

Lastly, any harm caused by the trial counsel's sentencing argument was cured by the military judge's sentencing instructions. Her instructions clearly delineated the differences between administrative discharges and punitive discharges and advised the members that their duty was to determine if the appellant should receive a punitive discharge and not whether he should remain in the Air Force.

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, YA-02, DAF
Clerk of the Court