UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant JUSTIN L. OZBUN
United States Air Force

ACM S30210

30 January 2004

Sentence adjudged 22 July 2002 by SPCM convened at Offutt Air Force Base, Nebraska. Military Judge: Gregory E. Pavlik (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain Jennifer K. Martwick

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Tracey L. Printer.

Before

PRATT, GRANT, and CONNELLY
Appellate Military Judges

OPINION OF THE COURT

CONNELLY, Judge:

Consistent with his pleas, the appellant was convicted of one specification of wrongful use of marijuana on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. His adjudged and approved sentence was a bad-conduct discharge and reduction to the grade of E-1. On appeal, the appellant submits that the trial counsel's argument portraying him as a chronic drug-user was improper and that his sentence is inappropriately severe.

I. Improper Argument

The appellant tested positive for the metabolite of marijuana on two urinalysis tests administered on 22 February 2002 and 5 March 2002. During his providence

inquiry, the appellant admitted to using marijuana on divers occasions during the charged timeframe but did not specify exact dates. The trial counsel in her sentencing argument stated, "Dr. Papa [a forensic toxicologist] also testified that in a chronic user, the marijuana metabolite can be detected in the urine for up to one month. So Dr. Papa didn't eliminate the possibility that the accused was a chronic user." The trial defense counsel did not object to this argument. The trial counsel also referenced the seven-month period covered by the specification and portrayed the appellant as using marijuana during the entire charged period. There was no objection by the trial defense counsel to this argument either. On appeal, the appellant objects to the characterization of him as a chronic user.

Trial counsel's argument must be viewed within the context of the entire court-martial. The focus of appellate inquiry is not on words in isolation but on the argument as "[v]iewed in context." *United States v. Young*, 470 U.S. 1, 16 (1985); *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000). Further, counsel is permitted to comment on the evidence and "such fair inferences as may be drawn therefrom." *United States v. White*, 36 M.J. 306, 308 (C.M.A. 1993) (quoting *United States v. Nelson*, 1 M.J. 235, 239-40 (C.M.A. 1975)). This argument was not improper in light of the two positive urinalysis and the appellant's admission that he has used marijuana on divers occasions, not specifically delineated, between July 2001 and February 2002. In addition, the appellant's assignment of error must fail as there was no timely objection by the trial defense counsel. Thus, appellate review of the issue is waived, absent plain error and we decline to find plain error under these facts. Rule for Courts-Martial 1001(g).

II. Sentence Appropriateness

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we affirm only so much of the sentence as we find "should be approved." In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the appellant receives the punishment he or she deserves. Performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of the appellant's service. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). The appellant's record reflects six years of good and productive service in the Air Force. He was contrite and took responsibility for his actions. The offense for which he was convicted, however, was serious misconduct, especially for a non-commissioned officer. The appellant admitted to using marijuana on divers occasions. Finally, the appellant faced one year in confinement and none was adjudged. Applying the legal standard stated above to the facts of this case, we find that the appellant's sentence is not inappropriately severe.

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

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator