

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman First Class MIHAILO RADOVIC  
United States Air Force**

**ACM S31089**

**4 May 2007**

Sentence adjudged 2 March 2006 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Joseph E. Cole.

Approved sentence: Bad-conduct discharge, confinement for 30 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Robert V. Combs, and Major Kimani R. Eason.

Before

**BROWN, BECHTOLD, and BRAND**  
Appellate Military Judges

**PER CURIAM:**

The appellant was convicted, in accordance with his plea, of one specification of wrongful use of cocaine on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. §912a. His approved sentence, adjudged by officer members, consists of a bad-conduct discharge, confinement for 30 days, and reduction to E-1.

On appeal, the appellant alleges error in that the trial counsel's sentencing argument was erroneous and materially prejudiced the substantial rights of the appellant when the trial counsel argued: (1) facts not in evidence specifically designed to incite the passions of the members; and (2) incorrect information that led the members to believe that if a punitive discharge was not adjudged the appellant would continue to serve on active duty and ultimately receive an honorable service characterization.

The trial counsel's sentencing argument encompasses approximately 12 pages in the record of trial. The assigned error involves four sentences from that argument. Shortly into his sentencing argument, the trial counsel said "And you heard that after he made that decision to snort those lines of cocaine, that he drove immediately back onto Lackland Air Force Base, a base full of a population of young kids, this accused, after using cocaine, drove onto Lackland." Shortly thereafter, when explaining to the members the message that would be sent if they did not adjudge a bad-conduct discharge, he said "The message that you're sending is you can go out and use cocaine whenever you would like until you get caught, and then you can just stay in the Air Force and you can leave on your own terms. And when you leave you can say you served honorably." No objection was made at trial by defense counsel to any of the comments which form the basis of the alleged errors.

The standard of review for an improper argument depends on the content of the argument and whether the defense counsel objected to the argument. *United States v Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). 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). Whether or not the comments are fair must be resolved when viewed within the entire court-martial. *United States v Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v Nelson*, 1 M.J. 235, 239 (C.M.A. 1975). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Gilley*, 56 M.J. at 123. Failure to object to improper argument waives the objection absent plain error. Rule for Courts-Martial 1001(g). To find plain error, we must be convinced: (1) that there was error, (2) that it was plain or obvious, and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 462-64 (C.A.A.F. 1998).

During the presentencing proceeding, the appellant's written statement made to investigators was admitted into evidence. On that form, the appellant stated that after snorting cocaine while in his car three separate times, he threw the cocaine out the window, and drove back to his dormitory at Lackland Air Force Base. Contrary to the appellant's assertion, there is a reasonable inference the appellant was under the influence of cocaine when he drove on to the base. The trial counsel's phrase "a base full of a population of young kids," might have been a bit zealous, but when viewed in context of the entire record and the evidence in the trial, it was clearly not calculated to inflame the passions of the members, and did not materially prejudice a substantial right of the appellant.

Turning to the second comments made by the trial counsel: "The message that you're sending is you can go out and use cocaine whenever you would like until you get

caught, and then you can just stay in the Air Force and you can leave on your own terms. And when you leave you can say you served honorably”, the court finds that these comments did blur the distinction between a punitive discharge and administrative separation, and were therefore improper argument. *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)). Viewing the erroneous statements within the context of the argument and the record of trial, it is clear these statements were not the focus of the trial counsel’s argument. The focus was the seriousness of the offense and its repetitive nature. The appellant admitted to using cocaine on two distinct dates, and three times on each date. The appellant had ample opportunity to reflect on his first foray into illegal drug use prior to using the cocaine again, several months later. The trial counsel went on extensively as to why a bad-conduct discharge was appropriate under the circumstances of this case. It is clear the statements did not result in material prejudice to the appellant.

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 findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF  
Chief Court Administrator