UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic EDDIE L. SAENZ
United States Air Force

ACM 34734

11 July 2002

Sentence adjudged 7 August 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Steven A. Hatfield.

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Lieutenant Colonel Timothy W. Murphy, and Captain Shelly W. Schools.

Appellate Counsel for the United States: Colonel Anthony P. Datillo, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

YOUNG, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

BRESLIN, Senior Judge:

The appellant was convicted, in accordance with his pleas, of dereliction of duty by wrongfully leaving the installation without authority, wrongfully distributing some amount of Flunitrazepam (Rohypnol), a Schedule IV controlled substance, and wrongfully introducing Rohypnol onto Lackland Air Force Base, in violation of Articles 92 and 112a, UCMJ, 10 U.S.C. §§ 892, 912a. He was acquitted of four specifications alleging the wrongful use, distribution, and introduction of marijuana and cocaine.

During the sentencing proceedings, the defense submitted character statements on the appellant's behalf, and the appellant offered an unsworn statement. The military judge advised counsel that he would not instruct on specific matters either in extenuation and mitigation or in aggravation, except that a plea of guilty is a matter in mitigation. In that regard, the military judge instructed the members:

> In selecting a sentence, you should consider all matters in extenuation and mitigation introduced by the defense as well as all matters in aggravation introduced by the prosecution concerning the offenses of which the accused has been convicted, whether introduced before or after your findings.
>
> A plea of guilty is a matter in mitigation which must be considered along with all other facts and circumstances of the case. Time, effort, and expense to the government usually are saved by a plea of guilty. Such a plea may be the first step toward rehabilitation.

Trial defense counsel did not object to the instruction, or request further instructions.

The maximum possible punishment for the offenses was a dishonorable discharge, confinement for 12 years and 6 months, total forfeiture of all pay and allowances, and a fine. The general court-martial, comprised of officer members, sentenced the appellant to a bad-conduct discharge, 6 months' confinement, and total forfeitures. The convening authority approved the sentence, but reduced the period of confinement to 4 months.

The appellant now contends that the military judge erred in not providing detailed instructions highlighting the specific evidence that the members should consider in extenuation or mitigation. We find no error, and affirm.

As noted above, trial defense counsel did not object to the military judge's sentencing instructions. "Failure to object to an instruction or to omission of 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). *See also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court."); *United States v. Maxwell*, 45 M.J. 406, 426 (1996); *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986). The purpose of the waiver rule is,

> [T]o prevent defense counsel from remaining silent, making no objection, and then raising the issue on appeal for the first time, long after any possibility of curing the problem has vanished. It is important 'to encourage all trial participants to seek a fair and accurate trial the first time around.'

United States v. Causey, 37 M.J. 308, 311 (C.M.A. 1993) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)). *See United States v. Reist*, 50 M.J. 108, 110 (1999).

We must review the military judge's instructions in this case for plain error. The Supreme Court characterized plain error as a "limitation on appellate authority." *United States v. Olano*, 507 U.S. 725, 732-34 (1993). In order to find plain error, we must find three elements: (1) That there was "error"; (2) That the error was "plain," that is, "clear" or "obvious"; and (3) That the plain error materially prejudiced substantial rights. *United States v. Powell*, 49 M.J. 460, 462-64 (1998)(citations omitted). The appellant has the burden of establishing plain error. *Reist*, 50 M.J. at 110.

R.C.M. 1005(a) states, "The military judge shall give the members appropriate instructions on sentence." R.C.M. 1005(e) provides:

> (e) *Required instructions*. Instructions on sentence shall include:
>
> ….
>
> (5) A statement that the members should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, and matters introduced under R.C.M. 1001(b)(1), (2), (3) and (5).

Military case law requires that the military judge give general guidelines to the court members about the matters they should consider in sentencing. *United States v. Hopkins*, 56 M.J. 393, 394-95 (2002); *United States v. Greaves*, 46 M.J. 133, 139 (1997). In the seminal case *United States v. Wheeler*, 38 C.M.R. 72, 75 (C.M.A. 1967), the (then) Court of Military Appeals held it was the duty of the law officer to "tailor his instructions on the sentence to the law and the evidence." The "tailoring" envisioned by *Wheeler* is in selecting the general categories of mitigating or extenuating evidence which are appropriate for instruction, such as evidence of good character, a good service record, pretrial restraint, or mental impairment. *United States v. Blough*, ACM S30038, slip op. at 4-7 (A.F. Ct. Crim. App. 28 June 2002). It is not necessary to detail each piece of evidence that may demonstrate such matters, although a military judge certainly has the discretion to do so. *Hopkins*, 56 M.J. at 395 and n.2 (within the military judge's discretion to address the accused's expression of remorse by instructing the members that they should consider the accused's unsworn statement); *United States v. Tackett*, 41 C.M.R. 85, 87 (C.M.A. 1969) (military judge should not instruct on matters not raised by the evidence); *United States v. Holcomb*, 39 C.M.R. 202, 207-08 (C.M.A. 1969) (instructions to consider "all the facts" in the case, including matters in "extenuation and mitigation" held sufficient); *Wheeler*, 38 C.M.R. at 76 (appropriate to instruct in accordance with Army Pamphlet 27-9, April 1958, on the need to consider "'the background and character of the accused; . . . the . . . record of the accused in the service for good conduct . . . [and] other traits which characterize a good soldier;' the plea of

guilty; and other matters which the court should consider.") (omissions and alterations in original); *United States v. Rake*, 28 C.M.R. 383, 384 (C.M.A. 1960) (the military judge "is not required to detail each and every matter that the court-martial might possibly consider in mitigation.").

Turning to the case at bar, we find no plain error. The appellant had been in the Air Force only a short time. He completed basic training, but did not complete technical training before the charges arose in this case. He did not have a performance report. The thrust of the defense case was that the appellant was a decent young man from a good family background who made a mistake, but who deserved a fair chance to make something of his life. The defense submitted numerous character statements from family members and friends attesting to his character. The defense also raised the fact that the appellant had been waiting for trial in a casual status for over one year, and had to reside in a dormitory undergoing renovations. The military judge's instructions were sufficient to provide the members general guidance on matters they should consider in sentencing. Therefore, we find no error. Also, we find that the lack of a more specific instruction did not materially prejudice the appellant's substantial rights. Trial defense counsel ably argued the significance of the matters raised on behalf of the appellant. There is nothing about the sentence that would suggest that the members did not consider the matters presented by the defense.

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), UMCJ, 10 U.S.C. § 866(c); *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator