UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class KAMALI A. SALCEDO
United States Air Force

ACM 34651

26 July 2002

Sentence adjudged 1 June 2001 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: Mark R. Ruppert.

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

Appellate Counsel for Appellant: Lieutenant Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Captain Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Jennifer R. Rider.

Before

YOUNG, BRESLIN, and HEAD
Appellate Military Judges

OPINION OF THE COURT

YOUNG, Chief Judge:

The appellant pled guilty to wrongfully using methylenedioxymethamphetamine (ecstasy), a Schedule I controlled substance, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved only so much of the sentence adjudged by the court members as provided for a bad-conduct discharge, reduction to E-1, and a reprimand. The appellant claims the military judge erred in instructing the court members, and the sentence is inappropriately severe. We affirm.

I. The Sentencing Instructions

The appellant asserts that the military judge erred by not providing the court members a list of specific mitigating factors to consider in adjudging his sentence and by giving the members an inappropriate instruction concerning administrative discharges.

We review the military judge's sentencing instructions for an abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (2002) (citing *United States v. Greaves*, 46 M.J. 133 (1997)). A military judge abuses his discretion when "[t]he challenged action" is "arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987) (citations omitted).

A. Mitigating Factors

The appellant asked the military judge to advise the members they should consider the following mitigating factors in adjudging a sentence:

> 1. The fact that A1C Salcedo has stipulated with the prosecution and saved the prosecution the time and expense of calling witnesses;
>
> 2. The fact that A1C Salcedo waived his Article 32 investigation and saved the government the time and expense of holding such a hearing;
>
> 3. A1C Salcedo's expression of his desire to remain in the service and that he has indicated that he does not desire a Bad Conduct Discharge.

App. Ex. XIV.

The military judge declined. Instead, he gave the following instruction:

> In determining the sentence, you should consider all the facts and circumstances of the offense of which the accused has been convicted and all matters concerning the accused. Thus, you should consider the accused's background, his character, his service record, all matters in extenuation and mitigation, and any other evidence he presented.
>
> . . .
>
> 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 have been saved by a plea of guilty. Such a plea may be the first step towards rehabilitation.

R. 192-95.

There is no requirement that the military judge "list each and every possible mitigating factor for the court members to consider." *United States v. Hopkins*, 55 M.J. 546, 550 (A.F. Ct. Crim. App. 2001), *aff'd*, 56 M.J. 393 (2002). After looking at the military judge's instructions as a whole, we are convinced they adequately informed the members of their sentencing responsibilities. *United States v. Blough*, ACM S30038, slip op. at 4-7 (A.F. Ct. Crim. App. 28 Jun 2002).

B. Administrative Discharge

The following is an extract of the appellant's unsworn statement:

> I have been told that no matter what happens here in court, my Commander is going to give me an administrative discharge as soon as this case is over. No matter what you decide, my career in the Air Force is over. I'm simply begging you not to ruin my future and my ability to get a decent civilian job so I can support my family.

R. 172.

In a hearing conducted out of the presence of the members, the military judge discussed with counsel the following instruction he intended to give the members in response to the appellant's unsworn statement:

> In his unsworn statement, the accused made 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 for several reasons.
>
> First, you have no power to initiate or adjudge an administrative discharge.
>
> Two, as to discharge, the only issue before you—as I've already instructed 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, nor execute such a discharge. Thus, to consider the possibility of an administrative discharge or its propriety, does result in the speculation about matters beyond your control and discretion.
>
> Four, the decision whether or not to initiate an administrative discharge—and, if initiated, to approve such a discharge—is based on wholly different set of criteria than the criteria applicable in deciding whether to adjudge a punitive discharge.
>
> You are only advised as to the criteria for either adjudging a bad conduct or a dishonorable discharge.
>
> The administrative discharge process is simply not before you. In short, 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 instructions on the nature of an unsworn statement, you should consider yourselves at liberty to disregard any reference to an administrative discharge.
>
> The consideration and weight you give the reference is up to you in your sound discretion.

R. 194.

The military judge specifically asked the defense if there was an objection to the instruction. The defense counsel said he had no objection. R. 169. The appellant now claims the military judge committed plain error by giving the instruction.

"Plain error" is a legal practice that "provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in [the trial] court." *United States v. Olano*, 507 U.S. 725, 731 (1993). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Waiver extinguishes the "error." *See Id.*; *United States v. Strachan*, 35 M.J. 362, 364 (C.M.A. 1992). The appellant extinguished the issue of error by affirmatively accepting the proposed instruction.

II. Sentence Severity

We may only affirm that part of a sentence which is correct in law and fact. Article 66(c), UCMJ, 10 U.S.C. § 866(c). After reviewing the entire record and giving individualized consideration to the nature and seriousness of the offense and the character of the offender, we are convinced the sentence is appropriate. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

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. 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