

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Technical Sergeant MARK C. SEMM
United States Air Force**

ACM 37415

22 March 2010

Sentence adjudged 18 December 2008 by GCM convened at Minot Air Force Base, North Dakota. Military Judge: William M. Burd.

Approved sentence: Bad-conduct discharge and reduction to E-3.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Michael A. Burnat, Major Jennifer Raab, and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, Captain Joseph Kubler, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

Pursuant to a pretrial agreement the appellant pled guilty to multiple offenses involving sexual misconduct in violation of Articles 92 and 134, UCMJ, 10 U.S.C. §§ 892, 934. While deployed to Bagram Air Base, Afghanistan, he violated a lawful general order by producing and possessing sexually explicit material. Back at his assigned base, the appellant recruited junior members of his squadron and other civilians to participate with him and his wife in sexual acts which he videotaped and posted to a pornographic website that he and his wife maintained. This misconduct provided the basis for the appellant's plea to one specification of violating a lawful general order, six specifications of committing indecent acts, and two specifications of pandering.

A panel of officers sentenced him to a bad-conduct discharge, restriction to Minot Air Force Base for one month, and reduction to E-3. The convening authority approved the bad-conduct discharge and reduction in grade but disapproved the restriction.¹ On appeal the appellant asserts plain error in the trial counsel's sentencing argument, claiming that the argument (1) improperly characterized the distinction between punitive and administrative discharges and (2) erroneously described the appellant's prior court-martial conviction for indecent acts as a matter in aggravation. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

Facts

During the sentencing phase, the military judge admitted without objection the appellant's 2005 special court-martial conviction for adultery and indecent acts by engaging in conduct substantially similar to that charged in the present case.² In support of his argument for a bad-conduct discharge, confinement for 18 months, and reduction to E-4, the trial counsel extensively argued the facts of the present case. He then turned to the appellant's prior conviction as "one of the aggravating factors" by focusing on the close similarity of the prior misconduct to the current charges and the appellant's continuation of such misconduct both during and after his prior court-martial.

Regarding the punitive discharge, the trial counsel properly described it as a "severe punishment" that deprives one of benefits reserved for those who have served honorably. In his argument, the trial defense counsel agreed with trial counsel's characterization of a punitive discharge as "severe," then described the financial impact of a loss of retirement benefits caused by a punitive discharge. In rebuttal to the trial defense counsel's argument concerning retirement benefits, the trial counsel argued that the appellant deserved the "severe" punishment of a punitive discharge because retirement benefits should be reserved for those who serve honorably. The only objection by the trial defense counsel concerned the repetitiveness rather than the substance of the trial counsel's argument.

Discussion

Failure to object to improper argument before the start of sentencing instructions waives the objection. Rule for Courts-Martial 1001(g). Absent objection, argument is

¹ The pretrial agreement had no effect on the sentence since it capped confinement at 18 months.

² In the appellant's prior court-martial, he was charged with two specifications of a violation of Article 134, UCMJ, 10 U.S.C. § 934. The first specification alleged that he wrongfully had sexual intercourse with Senior Airman ALW, a woman not his wife. The second specification of the prior charge alleges that the appellant committed an indecent act with Senior Airman ALW and the appellant's wife by engaging in oral sodomy and sexual intercourse with Senior Airman ALW in the presence of the appellant's wife and by engaging in sexual intercourse with the appellant's wife in the presence of Senior Airman ALW. The appellant pled guilty to both offenses and was sentenced by a panel of officer and enlisted members to a reduction to E-5 and three months hard labor without confinement.

reviewed for plain error. *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009), *cert. denied*, 129 S.Ct. 2416 (2009). “Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice.” *Id.* (quoting *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). Error is not “plain and obvious” if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened *sua sponte*. *Id.* at 153 (citing *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008)). Here, we find no error, plain or otherwise, in the trial counsel’s argument.

Viewed in the context of the evidence presented and the appellant’s emphasis on potential loss of retirement income after over 19 years of service, the trial counsel’s argument concerning a punitive discharge properly contrasted the impact of this severe punishment on benefits normally reserved for those who serve honorably. The appellant argues that the trial counsel’s remarks “made it seem” that the appellant would receive an honorable discharge if the court-martial did not adjudge a punitive discharge. Viewing the remarks in isolation could support this conclusion, but the overall context clearly shows that the trial counsel aimed his remarks at the appellant’s effort to avoid a bad-conduct discharge by emphasizing loss of benefits rather than a return to duty. The lack of objection indicates that the trial defense counsel understood the argument in that context, and we concur.

The appellant concedes that the trial counsel properly argued his prior court-martial conviction on the issue of rehabilitative potential, but claims plain error by the trial counsel’s characterization of the conviction as also a matter in aggravation. Aggravating evidence includes that which is closely related to the charged offenses in time, type, and/or outcome. *United States v. Hardison*, 64 M.J. 279, 281-82 (C.A.A.F. 2007). Aggravation evidence includes that which shows a continuous course of conduct involving similar crimes, similar victims, and similar locations. *Id.*

Here, the appellant’s prior conviction not only concerns the same type of misconduct found on his current charge sheet, but the misconduct was also contemporaneous with some of the current charges. For example, while his prior conviction on 15 March 2005 for indecent acts was pending final action by the convening authority, the appellant committed another indecent act with KW and his wife in April 2005. This indecent act became the subject of Specification 6 of Charge II, at the appellant’s second court-martial. As government counsel states in his brief, the appellant’s “continued and brazen misconduct” in the face of a court-martial conviction for the same type of misconduct is certainly aggravating. Under these facts, the claim that the appellant’s prior court-martial conviction is not proper aggravation is meritless.

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



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over the seal.

STEVEN LUCAS, YA-02, DAF
Clerk of the Court