UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic KAYLA D. SNIPE
United States Air Force

ACM 37536

22 October 2010

Sentence adjudged 30 June 2009 by GCM convened at Barksdale Air Force Base, Louisiana. Military Judge: Katherine Oler and William Orr, Jr. (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 8 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Shannon A. Bennett, and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Kimani R. Eason, Captain Charles G. Warren, and Gerald R. Bruce, Esquire.

Before

BRAND, GREGORY, and ROAN
Appellate Military Judges

PER CURIAM:

In accordance with her pleas, the appellant was convicted of one specification of malingering, one specification of larceny of $2,275.32, two specifications of uttering bad checks, and two specifications of using someone else's identity to obtain services and goods, in violation of Articles 115, 121, 123a, and 134, UCMJ, 10 U.S.C. §§ 915, 921, 923a, 934. The appellant was found not guilty of a second specification of malingering,

in violation of Article 115, UCMJ.[1] The approved sentence consists of a bad-conduct discharge and eight months of confinement.[2]

The issue on appeal is whether the sentence should be set aside because the military judge admitted Prosecution Exhibit 10 which contained evidence of uncharged misconduct and the trial counsel argued its use for an impermissible purpose.

Background

After the appellant returned from her deployment to Kuwait in January 2008, she began to encounter financial difficulties. Misuse of her government travel card (GTC) and failure to pay her outstanding GTC debt resulted in two nonjudicial punishment actions under Article 15, UCMJ, 10 U.S.C. § 815, and a vacation action. The appellant then started writing bad checks and had a fellow airman, A1C JA, cash the checks for her at AAFES.[3] Additionally, she applied for and received two credit cards in another person's name (SrA KH). She obtained goods and services in excess of $1,000.00 with the fraudulent credit cards. In February 2009, the appellant took a number of Tylenol PM pills and ended up in the hospital. She stated she took the pills to sleep in and avoid going to work. She reasoned that if she continued to be a burden, her squadron would speed up her administrative discharge processing.

Among other evidence presented during trial, the trial counsel provided Prosecution Exhibit 10 in the presentencing proceeding. Prosecution Exhibit 10 was five pages and included a Request for a Commandant's Board, a Statement of Honor Charges, and a Letter of Disenrollment from the United States Military Academy Preparatory School. These actions occurred in December 2005.[4] Prosecution Exhibit 10 was certified as a true and accurate copy by Major GT, the Battalion TAC Officer.[5]

Admission of Evidence

We review a military judge's ruling regarding admissibility of evidence for abuse of discretion. *United States v. Datz*, 61 M.J. 37, 42 (C.A.A.F. 2005) (quoting *United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997)); *United States v. Gilbride*, 56 M.J. 428, 430 (C.A.A.F. 2002) (citing *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). An abuse of discretion occurs when the trial court's findings of fact are clearly erroneous

[1] The government chose not to present evidence on the specification.
[2] The appellant and the convening authority (CA) had a pretrial agreement in which the CA would not approve more than eight months of confinement if restitution was made to A1C JA.
[3] From 28 September until 6 November 2008, the appellant wrote 13 checks for a total of $1,300. AAFES charged $450.00 for the bounced checks.
[4] The appellant's Total Active Federal Military Service date is 13 June 2006. She came on active duty in the Air Force six months after being disenrolled from the United States Military Academy Preparatory School.
[5] "TAC" was not explained in the record of trial, although the exhibit referenced the Battalion Duty Officer (BDO) and the Battalion Tactical Officer (BTO).

or if the court's decision is influenced by an erroneous view of the law. *United States v. Freeman*, 65 M.J. 451, 453 (C.A.A.F. 2008) (citing *United States v. Rader*, 65 M.J. 30, 32 (C.A.A.F. 2007)).

The trial defense counsel objected to the admission of Prosecution Exhibit 10 on hearsay grounds and that it was not proper Rule for Courts-Martial (R.C.M.) 1001(b)(2) evidence stating that "there is no indication that it was kept or maintained in accordance with departmental regulations." The defense counsel further objected that the evidence was not directly related to the offenses charged and that it was unfairly prejudicial.

In response, the trial counsel maintained the evidence was certified on each page by Major GT. He further stated the evidence "goes directly" to rehabilitation potential. The trial counsel then referenced R.C.M. 1001(b)(2) which states the personnel records of the accused "includes any records made or maintained in accordance with departmental regulations that reflect the past military efficiency, conduct, performance, and history of the accused."

The military judge ruled that since there was no evidence to indicate the record was not properly kept and there was evidence it was certified, it was part of the personnel records of the appellant. Further, he ruled it was not unfairly prejudicial under the standard set out in Mil. R. Evid. 403.

Under the circumstances of this case, the military judge found facts supported by the record, applied the correct standard of law and correctly used the balancing test. He did not abuse his discretion when he admitted Prosecution Exhibit 10.

Sentencing Argument

"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), *aff'd*, 65 M.J. 221 (C.A.A.F. 2007). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the [appellant]." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). The question of whether the comments are fair must be resolved by viewing them within the entire context of the court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). Additionally, it is appropriate for the trial counsel, who is charged with being a zealous advocate for the government, to argue the evidence of record, as well as all reasonable inferences fairly derived from such evidence. *Baer*, 53 M.J. at 237 (citing *United States v. Nelson*, 1 M.J. 235, 239 (C.M.A. 1975)). The lack of a 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 sentencing argument waives the objection absent plain error. R.C.M. 1001(g).

The trial defense counsel did not object to the sentencing argument of the trial counsel when the trial counsel mentioned the evidence contained in Prosecution Exhibit 10. The trial counsel focused on this evidence for one and one-half pages in his initial sentencing argument and for two paragraphs in his rebuttal argument.[6]

The failure to object to the argument waives the objection absent plain error. Reviewing the entire record, it is clear that the trial counsel was making a proper argument based upon the evidence admitted. Therefore, we find no error, plain or otherwise.

Conclusion

The findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred.[7] 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

STEVEN LUCAS
Clerk of the Court

[6] The initial argument covered 22 pages in the Record of Trial and 6 pages in rebuttal.
[7] This Court noted that the Prosecution Exhibit 14 attached to the original record was not the Prosecution Exhibit 14 referenced during trial. The correct Prosecution Exhibit 14 has since been attached.