UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic MATHIEU Y. ST. LAURENT
United States Air Force

ACM S30955

28 December 2006

Sentence adjudged 12 July 2005 by SPCM convened at Patrick Air Force Base, Florida. Military Judge: Bruce S. Ambrose (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 8 months, and forfeiture of $823.00 pay per month for 8 months.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Captain Vicki A. Belleau.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, and Lieutenant Colonel Michael E. Savage.

Before

BROWN, JACOBSON, and SCHOLZ
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JACOBSON, Judge

The appellant was convicted, in accordance with his pleas, of wrongfully using cocaine on divers occasions, wrongfully introducing cocaine onto Patrick Air Force Base on divers occasions, and an Additional Charge and Specification alleging a single wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A military judge, sitting alone as a special court-martial, sentenced

him to a bad-conduct discharge, confinement for 9 months, and forfeiture of $823 pay per month for 9 months. The convening authority, in accordance with the pretrial agreement, approved only so much of the sentence as called for a bad-conduct discharge, confinement for 8 months, and forfeiture of $823 pay per month for 8 months. On appeal, the appellant asserts that the trial judge erred when he admitted certain evidence during the sentencing phase of the trial, and that his sentence is inappropriately severe.[*] As to the first assignment of error, we agree with the appellant that the judge improperly admitted statements by the appellant's acting First Sergeant during the sentencing phase of his trial, but we find the error to be harmless. We find appellant's second assignment of error to be without merit. We therefore affirm the findings and sentence.

The appellant was assigned to the 45th Civil Engineer Squadron at Patrick Air Force Base, Florida. By the time of his trial he had served approximately 17 months on active duty. During his short time in the Air Force, he had accumulated five letters of reprimand and once received nonjudicial punishment pursuant to Article 15, UCMJ, 10 U.S.C. § 815. Each of these documents was properly admitted into evidence, pursuant to Rule for Courts-martial (R.C.M.) 1001, during the presentencing phase of the court-martial without defense objection.

The error assigned in this case arises from the testimony of the squadron's acting First Sergeant, MSgt M, during the sentencing phase of the trial. The government called MSgt M to present evidence in aggravation. The appellant avers that two types of improper testimony were elicited from this witness. First, the appellant claims that the witness was allowed to introduce, over defense objection, specific incidents of conduct not directly related to the appellant's crimes prior to giving his opinion on the rehabilitation potential of the appellant. Second, the appellant asserts that the government did not lay a proper foundation for admission of the witness' opinion regarding the appellant's rehabilitation potential.

R.C.M. 1001(b)(5) provides the prosecution with the authority to admit evidence of an accused's rehabilitative potential during the sentencing phase of trial. R.C.M. 1001(b)(5)(A) provides that evidence of rehabilitative potential can include opinions about an accused's "previous performance as a servicemember

[*] Specifically, the appellant presents the following issues:

I.

WHETHER THE MILITARY JUDGE ERRED BY ADMITTING EVIDENCE IN VIOLATION OF [RULE FOR COURTS-MARTIAL] R.C.M. 1001, OVER DEFENSE OBJECTION, OF SPECIFIC INSTANCES NOT RELATED TO THE CHARGED OFFENSES AND NOT PROPER REHABILITATION EVIDENCE.

II.

WHETHER APPELLANT'S SENTENCE IS INAPPROPRIATELY SEVERE. (This issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982)).

and potential for rehabilitation." However, R.C.M. 1001(b)(5)(D) limits the scope of the opinion that can be offered, stating, "[a]n opinion offered under this rule is limited to whether the accused has rehabilitative potential and to the magnitude or quality of any such potential." The discussion to this rule elaborates on this limitation by stating:

> On direct examination, a witness…may respond affirmatively or negatively regarding whether the accused has rehabilitative potential. The witness…may also opine succinctly regarding the magnitude or quality of the accused['s] rehabilitative potential; for example, the witness or deponent may opine that the accused has "great" or "little" rehabilitative potential. The witness… generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion.

Specific instances of conduct, that may be the basis for a witness's opinion regarding an accused's rehabilitative potential, are not admissible on direct examination by the trial counsel. *United States v. Gregory,* 31 M.J. 236, 238 (C.M.A. 1990). Further, "the limitations against mention of specific instances of conduct, except on cross-examination, apply to all opinions given under R.C.M. 1001(b)(5), not just to opinions about rehabilitation potential." *United States v. Sheridan,* 43 M.J. 682, 684 (A.F. Ct. Crim. App. 1995) (holding that R.C.M. 1001(b)(5) uses the term "rehabilitation potential" to include opinions concerning an accused's previous performance as a service member). The military judge allowed MSgt M to testify on several inappropriate areas despite repeated defense objections. First, the witness testified that he sent the appellant to the base hospital for a urinalysis one morning after the appellant arrived at work with alcohol on his breath. Second, he testified that the appellant had been involved in a "hit and run" accident "downtown." Third, the witness briefly mentioned an incident in which the appellant attempted to obtain emergency leave by claiming that his mother was ill. Finally, the witness was allowed to tell the factfinder that he had heard that debt collectors were calling the appellant's duty location because the appellant was behind on car payments.

We review a judge's decision to admit or exclude evidence for abuse of discretion. *United States v. McCollum*, 58 M.J. 323, 335 (C.A.A.F. 2003). A military judge abuses his discretion when evidence is admitted based on an erroneous view of the law. *United States v. Holt*, 58 M.J. 227, 230-31 (C.A.A.F. 2003). Using this standard, we find that the military judge erred when he overruled the trial defense counsel's objections and allowed MSgt M to testify in regard to specific instances of conduct by the accused. The rules for eliciting opinions of an accused's "rehabilitative potential" are clear and well-established.

Trial counsel failed to comply with these rules and the military judge erred by allowing the testimony into evidence.

Having found error, we must now determine whether the appellant was prejudiced by the admission of the improper evidence. Article 59(a), UCMJ, 10 U.S.C. § 859(a). We hold that he was not. In reviewing the entire record, we find that MSgt M's testimony regarding the specific acts was cumulative with similar evidence properly admitted by the trial judge as prosecution exhibits. His statements added nothing to the government's case in aggravation and therefore did not materially prejudice the substantial rights of the accused. Thus, although we find the military judge erred by admitting the statements, we find the error to be harmless.

We find the appellant's second assertion under this assignment of error – that MSgt M was unqualified to present an opinion as to the appellant's rehabilitation potential – to be without merit. The record of trial clearly indicates that MSgt M had extensive interaction with the appellant for over a year. He was familiar with the appellant's performance and behavior both on and off duty, and was even aware of details regarding the appellant's personal life. The military judge did not abuse his discretion by allowing the witness to give his opinion of the appellant's rehabilitation potential.

As for the appellant's second assignment of error, after considering the nature and seriousness of the appellant's criminal behavior and all matters in extenuation and mitigation, we find that the appellant's sentence is not inappropriately severe. *See United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982).

The 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). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

LOUIS T. FUSS, TSgt, USAF
Chief Court Administrator