UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JAMIE L. STRICKLAND
United States Air Force

ACM 36589

17 December 2007

Sentence adjudged 10 June 2005 by SPCM convened at Incirlik Air Base, Turkey. Military Judge: William Burd.

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

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Anniece Barber, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, Major Donna S. Rueppell, Major Steven R. Kaufman, and Captain Jefferson E. McBride.

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

OPINION OF THE COURT

SOYBEL, Appellate Judge:

Contrary to his pleas the appellant was found guilty at a special court-martial, comprised of officer and enlisted members, of committing an indecent act in violation of Article 134, UCMJ, 10 U.S.C. § 934, by having CG perform fellatio on him in the presence of other people. He was found not guilty of adultery and wrongfully providing alcohol to a child under the age of 16. He was sentenced to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence.

The appellant has raised three issues; however, we find no error. In his first assignment of error, he contends there was no evidence the convening authority knew of

his duty to review the appellant's clemency submission or actually considered it. An undisputed affidavit submitted by the convening authority establishes he did review and consider the appellant's clemency submission before taking action in this case.

In the second issue, the appellant asserts the trial counsel erred during his pre-sentencing argument when: a) He used the term "the government," thus interjecting command influence to sway the jury; b) He argued the jury should consider the American public's perception that the acts occurred in a conservative Muslim country, as well as Turkish public relations, in light of "delicate" relations with the United States, in order to impose a greater punishment; and c) He argued the appellant should have his service characterized accurately and should not have the same discharge as those who served honorably for many years or an entire career.

There were no objections made during the trial counsel's argument. Normally, this waives any error. Rule for Courts-Martial 1001(g). When this occurs we review the argument for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). That standard is met if there was an error; if the error was plain and obvious; and if the error materially prejudiced a substantial right of the accused.

As to his first contention, merely using the phrase "the government" in argument does not introduce command influence, nor would such a phrase unfairly influence the members. The appellant cites *United States v. Mallett*, 61 M.J. 761 (A.F. Ct. Crim. App. 2005), to support his position. In that case, involving drug use, we reviewed an argument where trial counsel generally referred to past commanders' calls he attended, during which commanders specifically warned against the use of illegal drugs and threatened harsh punishment for doing so. In *Mallett*, the trial counsel essentially asked the members to carry out a commander's threat of a harsh punishment for using drugs. *Id.* at 74. This case is nothing like *Mallett*. The trial counsel never referred to a commander or any punishment a commander would like to hand down. He merely said "Now the government is asking you to send a message to the accused and also to those who may consider doing [similar conduct]." The use of the phrase "the government," in this context, does not introduce command influence. It is merely an example of the trial counsel referring to his client who is, after all, "the government."

During his argument trial counsel also cited the conservative nature of the Turkish culture as a factor and also asked the members to consider the reaction of the American public if they knew what the appellant did. The appellant claims this argued facts not in evidence and tended to inflame the members. This argument is without merit. One of the elements of this Article 134 offense is that the conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. The military judge instructed the members that "service discrediting conduct is conduct, which tends to harm the reputation of the service or lower it in public esteem." Trial counsel's argument merely acknowledged this aspect of the appellant's offense and

it is a valid point, whether or not the public was actually was aware of it. *United States v. Mead*, 63 M.J. 724 (A.F. Ct. Crim. App. 2006). Moreover, the groups identified were the ones most likely to comprise "the public" in this case. In any event, this argument does not meet the plain error test under *Erickson*.

The last basis for the appellant's assertion of improper argument is that the trial counsel argued the jury should give the appellant a discharge he "deserves. . . . Not as though he served for ten, twenty, thirty years honorably like many people do. Otherwise what a disgrace it would be if his service was characterized any other way." From this, the appellant argues that trial counsel blurred the distinction between an administrative and a punitive discharge and between characterization of service and punishment. The appellant relies on *United States v. Motsinger*, 34 M.J. 255 (C.A.A.F. 1992), where the trial counsel clearly argued that the accused should be punitively discharged because she was a thief and should not be retained to serve in other units.

This was not what trial counsel was doing in this case. During this part of his argument, trial counsel was anticipating that the defense would argue that a

> bad-conduct discharge is serious punishment and it's a stigma. We've already heard about it being a stigma in the instructions from the judge. It's true, it is a serious punishment and it is a stigma. And that is exactly why you should give him a bad conduct discharge, because he deserves it. Give him what he deserves.

Trial counsel then went on to compare the appellant's service with people who served for many years. Trial counsel then argued that the appellant crossed a line that shouldn't be crossed and it affected morale. Given the context of the language, the trial counsel was properly asserting that the appellant deserved a bad-conduct discharge because it was a punishment. Additionally, we are confident that the *Erickson* standard was not met.

In his third assignment of error, raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant argues that a bad-conduct discharge was an excessively harsh sentence for receiving consensual fellatio in the presence of others. This Court reviews sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). We have a great deal of discretion in determining whether a particular sentence is appropriate, but are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The maximum possible punishment in this case was a bad-conduct discharge, confinement for 12 months, 2/3 forfeiture of pay per month for 12 months, and reduction to E-1. The appellant's adjudged and approved sentence was a bad-conduct discharge and reduction to E-1. Having reviewed the nature of the appellant's offense, and considering the appellant's time in service, military record, and all other matters in the record of trial, we hold that the approved sentence is not inappropriately severe. *See Healy*, 26 M.J. at 395 ("Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves.").

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 findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court