UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman TROY D. STROWD, JR.
United States Air Force

ACM 37497

08 June 2010

Sentence adjudged 13 March 2009 by GCM convened at Andrews Air Force Base, Maryland. Military Judge: Paula McCarron.

Approved sentence: Dishonorable discharge, confinement for 13 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Captain Andrew J. Unsicker.

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Colonel George F. May, Lieutenant Colonel Jeremy S. Weber, and Gerald R. Bruce, Esquire.

Before

BRAND, HELGET, and GREGORY
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted of two specifications of aggravated assault of a child under the age of 16 and one specification of willful dereliction of duty for underage drinking, in violation of Articles 128 and 92, UCMJ, 10 U.S.C. §§ 928, 892. The adjudged and approved sentence consists of a dishonorable discharge, confinement for 13 years, and reduction to E-1.

The issues on appeal are: (1) the military judge abused her discretion by allowing the trial counsel to cross-examine the defense expert about the appellant stealing prescription drugs and using illegal drugs and failed to give a limiting instruction; (2) the

military judge abused her discretion by allowing one of the members to ask the defense expert about collateral consequences of the appellant's confinement; and (3) the appellant's sentence of 13 years of confinement and a dishonorable discharge was inappropriately severe.[*]

Background

In June 2008, while his girlfriend, an active duty airman, was out buying him more beer, the appellant decided to beat her 10-month-old baby, VOS. The appellant was not in the same room as VOS, but as he thought about his own life and became more frustrated with it, he went to VOS's bedroom. He grabbed VOS, threw him down, bent his left arm back until his hand almost touched his elbow and it snapped. After hearing the snap, the appellant let go and left the room.

On 27 July 2008, the appellant's girlfriend again went out and left the appellant with VOS. VOS was ill so his girlfriend asked the appellant to take VOS's temperature. He did. Then he punched VOS in the head four times, punched his groin twice, pulled him by his hair, threw him against the wall, saw blood, stopped, threw him back on the bed, left, and went to watch TV. He was angry about his own life. During this assault, the appellant broke VOS's right arm.

During this same time frame, the appellant's girlfriend provided him with alcohol. He was underage. The appellant turned down an Article 15, UCMJ, 10 U.S.C. § 815, for underage drinking so this was added as an additional charge.

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)). Under an abuse of discretion review, we examine a military judge's findings of fact using a clearly erroneous standard and conclusions of law de novo. *United States v. Larson*, 66 M.J. 212, 215 (C.A.A.F. 2008), *cert. denied*, 129 S. Ct. 267 (2008); *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004) (quoting *Ayala*, 43 M.J. at 298). "[W]e consider the evidence 'in the light most favorable to the' prevailing party." *Rodriguez*, 60 M.J. at 246-47 (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)).

With respect to an appellant's failure to object to the admission of evidence at trial, a distinction has been made between "forfeiture" and "waiver" of a known right. "A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a

[*] All of the issues are raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). To determine whether a right has been forfeited or waived, we consider whether the trial defense counsel's failure to object "constituted an intentional relinquishment of a known right." *Id.* Generally speaking, forfeited issues are reviewed for plain error, whereas waived issues are not subject to appellate review. *Id.* (quoting *United States v. Pappas*, 409 F.3d 828, 830 (7th Cir. 2005)). When a right has been forfeited, "[Mil. R. Evid.] 103(d) allows appellate courts to recognize plain errors that materially prejudice an accused's substantial rights." *Id.* at 332 n.2. "The plain error standard is met when '(1) an error was committed; (2) the error was plain, or clear, or obvious; and (3) the error resulted in material prejudice to substantial rights.'" *United States v. Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008) (quoting *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007)).

During the presentencing phase of the trial, the defense called a forensic psychiatrist, Dr. TG. He testified about the sanity board report in great detail. On cross-examination, the trial counsel explored things contained in the sanity board report, including the fact that before the appellant entered the Air Force, he stole prescription drugs and used marijuana to relax. There was no objection to this line of questioning. The trial counsel was exploring the possibility of an "antisocial personality disorder" versus the "borderline personality disorder" which was diagnosed. When the trial counsel wanted to explore other illegal drug use (cocaine, heroin, LSD, etc.), the defense counsel objected and the objection was sustained.

The military judge did not abuse her discretion by permitting the initial testimony. The defense objection was sustained when it was made regarding the testimony about other irrelevant uses of illegal drugs. There was no objection to the testimony regarding the stealing of prescription drugs and marijuana use as this evidence was clearly relevant and admissible. Assuming, arguendo, the testimony was not relevant and the error was not waived, there is no plain error.

At the conclusion of direct and cross-examinations, the members had questions for Dr. TG. One of the members, Captain G, asked "[W]as [sic] someone matching [the appellant's] profile or diagnosis are there consequences of incarceration that would impact their treatment, rehabilitation, or unique circumstances that we should be aware of?" Dr. TG answered that the appellant would "have to adjust to the conditions of the incarceration. After which he would be able to engage in treatments for the conditions that he has. You know, most military prisons have psychiatrists available, psychologists available, and other counselors that could assist in his treatment." After the question was asked and answered, the defense counsel requested an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session.

During that session, the defense counsel expressed concerns with the question and indicated they had objected in writing on the appropriate appellate exhibits. The military judge agreed with the defense that the question and answer were objectionable, went into collateral consequences, and should not have been asked. Then the military judge discussed a proposed instruction with the counsel. Upon calling the members back into court, the military judge gave the agreed upon instruction, specifically:

> [D]isregard Captain [G's (the court member's)] question regarding incarceration and how that would affect [the appellant's] diagnoses and incarceration and how that would impact possible treatment for [the appellant] and the answer to those questions. The reason being, that the availability of treatment programs in confinement are collateral matters and should not be considered by you in determining a proper sentence.

No further objections were made by the counsel.

As for the testimony elicited from the defense expert by a member's question, there is no error as the military judge sustained an objection to the testimony and gave a curative instruction.

Sentence Appropriateness

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We "may affirm only such findings of guilty, and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006) (citing *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)), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007).

The appellant broke both arms of a defenseless 10-month-old child. He repeatedly punched the child in the head and groin. A co-worker of the appellant's, Senior Airman AN, testified that the appellant told her he was more upset that he was caught than that he had injured VOS and that VOS was in the hospital. Senior Airman AN further testified that the appellant "told me that while it was happening he knew in his mind that it was wrong, but that he enjoyed doing it. That it felt good." Further, the defense called the appellant's mom who testified that the appellant had called her and told her that VOS was in the hospital, that his girlfriend was beating VOS, and that he was afraid they might accuse him of hurting VOS. His mother told him to not worry, to call her later, and that he was innocent. Later when the appellant called her back, he was concerned that VOS

was in the hospital and that they might blame him. At that point, the appellant's mother asked the appellant, "Troy, did you do this?" He responded that he had. The appellant's mom also testified that the appellant's father was abusive toward her in front of her children.

After a careful review of the record of trial, to include the appellant's post-trial submissions, we conclude that the appellant's sentence was not inappropriately severe.

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; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

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