UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman TIMOTHY A. WHEAT
United States Air Force

ACM 34861

14 October 2003

Sentence adjudged 10 August 2001 by GCM convened at Lackland Air Force Base, Texas. Military Judge: Steven B. Thompson.

Approved sentence: Bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Jeffrey A. Vires, and Major Patrick J. Dolan.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Lieutenant Colonel David N. Cooper.

Before

BRESLIN, MOODY, and BILLETT
Appellate Military Judges

OPINION OF THE COURT

BILLETT, Judge:

The appellant was convicted, pursuant to his pleas, of three specifications of wrongful cocaine use, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The court members sentenced the appellant to a bad-conduct discharge, confinement for 18 months, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the adjudged sentence. On appeal, the appellant avers: (1) That the military judge erred by refusing to instruct the court members that a punitive discharge is an "ineradicable" stigma, and (2) That his sentence is inappropriately severe. We disagree and affirm.

I. Sentencing Instruction

We review a military judge's sentencing instructions for an abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (2002) (citing *United States v. Greaves*, 46 M.J. 133 (1997)). "The military judge has considerable discretion in tailoring instructions to the evidence and law." *Id.* We find no abuse of discretion and likewise find no error.

Following the sentencing proceeding at trial, defense counsel asked the military judge if he intended to use the word "ineradicable" when instructing the court members about the stigma of a punitive discharge. The military judge replied that he did not use that word in his instruction. Trial defense counsel then requested that the military judge use "ineradicable" to describe the stigma of a punitive discharge. The military judge stated that he believed that the law did not require that adjective and stated that he was not going to use it.

The military judge's instruction on the stigma of a punitive discharge to the court members was as follows:

> A dishonorable or bad conduct discharge is a punitive discharge. A stigma of a punitive discharge is commonly recognized by our society, and it will affect the accused's future with regard to legal rights, economic opportunities, and social acceptability. The issue before you is not whether the accused should remain a member of the Air Force, but whether he should be punitively separated from the service.

The appellant concedes that the facts of his case are essentially identical to those in *United States v. Greszler*, 56 M.J. 745 (A.F. Ct. Crim. App. 2002), *pet. denied*, 56 M.J. 470 (2002). In *Greszler*, the defense counsel requested a sentencing instruction that described the stigma of a punitive discharge as "ineradicable." *Id.* at 746. The military judge refused to use the word "ineradicable," and instead instructed the members that, "[t]he stigma of a punitive discharge is commonly recognized by our society." *Id.* In concluding that "ineradicable" was not an appropriate word to use in describing the stigma of a punitive discharge, this Court noted that the setting aside of an adjudged punitive discharge by reviewing authorities was a theoretical possibility, and therefore the effects of said discharge could not appropriately be described as "ineradicable." *Id.* The appellant asks this Court to reconsider our reasoning in that decision.

We see no reason to vary from our rationale in *Greszler*. The appellant asserts that implicit in our reasoning in *Greszler* is the notion that an appellant can easily have a punitive discharge set aside. This reading of the case is inaccurate. There is no explicit statement and no suggestion anywhere in *Greszler* to support such an interpretation. *Id.*

Greszler stands for the simple proposition, based on a resort to the plain dictionary definition of the word, that "ineradicable" means "incapable of being eliminated," and where there is any possibility that a punitive discharge and its accompanying stigma can be eradicated, the word "ineradicable" is an inappropriate and inaccurate modifier of the word "stigma" and need not be placed in the instruction. *Id.* (citations omitted). The fact that this Court went to some lengths in *Greszler* to describe the different ways a punitive discharge may be set aside in no way suggests that the process is an easy one or that an appellant seeking such relief enjoys a significant chance of success. *Id*. In accordance with the reasoning in *Grezsler*, we find no abuse of discretion and no plain error in the appellant's case.

II. Sentence Severity

Next, the appellant claims his sentence was inappropriately severe and asks that we disapprove his bad-conduct discharge. In support of his claim, the appellant argues his sentence failed to take certain factors into account. He points to the absence of aggravating circumstances in that he never used cocaine on duty, did not bring the cocaine on base, and did not share the drugs with anyone else. In arguing for a lesser sentence, the appellant also asserts his relative youth in that he was 22 years old at the time of the commission of the offenses, the difficult circumstances he faced while in pretrial confinement, his excellent attitude and work ethic while in pretrial confinement, and his excellent rehabilitative potential.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), requires that we affirm only so much of the sentence as we find "should be approved." In determining sentence appropriateness, we must exercise our judicial powers to assure that justice is done and that the appellant receives the punishment he or she deserves. Performing this function does not authorize this Court to exercise clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give individualized consideration to an appellant, including the nature and seriousness of the offenses and the character of the appellant's service. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Applying this standard, we find that the appellant's sentence is not inappropriately severe.

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 (2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL

HEATHER D. LABE
Clerk of Court