UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman CHRISTOPHER J. BARRETT
United States Air Force

ACM 36591

14 June 2007

Sentence adjudged 28 October 2005 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Gary M. Jackson.

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

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Major Anniece Barber, and Captain Vicki A. Belleau.

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

Before

FRANCIS, SOYBEL, and BRAND
Appellate Military Judges

PER CURIAM:

The appellant was convicted, in accordance with his plea, of one specification of wrongful use of ecstasy on divers occasions in violation of Article 112a, UCMJ, 10 U.S.C. §912a. His approved sentence, adjudged by officer and enlisted members, consists of a bad-conduct discharge and reduction to E-1.

On appeal, the appellant alleges error in that the military judge allowed the trial counsel to argue that a bad-conduct discharge was warranted in order to distinguish the appellant's service from those who served honorably.

The trial counsel's argument focused on punishing the appellant for using ecstasy three times, including while in technical training. Throughout the trial, the trial counsel

focused on sentencing factors and a harsh punishment. Trial counsel, in fact, argued for a bad-conduct discharge, total forfeiture of all pay and allowances, reduction to E-1, and 9 months of confinement. Contrary to the appellant's assertion in his assignment of error, the trial defense counsel did not object to the 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). The legal test for improper argument is "whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). Whether or not the comments are fair must be resolved when viewed within the context of the entire court-martial. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). It is appropriate for counsel to argue the evidence, as well as all reasonable inferences fairly derived from such evidence. *United States v. Nelson*, 1 M.J. 235, 238 (C.M.A. 1975). The lack of defense objection is some measure of the minimal impact of the trial counsel's improper argument. *Gilley*, 56 M.J. at 123 (citing *United States v. Carpenter*, 51 M.J. 393,397 (C.A.A.F. 1999)). Failure to object to improper argument waives the objection absent plain error. Rule for Courts-Martial 1001(g). To find plain error, we must be convinced: (1) that there was error; (2) that it was plain or obvious; and (3) that it materially prejudiced a substantial right of the appellant. *United States v. Powell*, 49 M.J. 460, 463 (C.A.A.F. 1998) (citing *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986)).

Reviewing the trial counsel's argument and the entire record of trial, it is apparent the focus of the argument was punishment. Assuming, arguendo, the comments did blur the distinction between a punitive discharge and administrative separation, and were improper argument, it is clear the statements did not result in material prejudice to the appellant. *United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992).

One other issue of note, pointed out in the appellant's brief, is that the trial counsel failed to account for all the members on the record. However, even though the trial counsel announced only the enlisted members, each member was addressed individually at some point during voir dire. The appellant asserts no prejudice from this error and we agree.

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 approved findings and sentence are

AFFIRMED.

OFFICIAL

MARTHA COBLE-BEACH, TSgt, USAF
Court Administrator