UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DANIEL R. CAMINITI
United States Air Force

ACM 34562

27 February 2003

Sentence adjudged 23 February 2001 by GCM convened at MacDill Air Force Base, Florida. Military Judge: Thomas G. Crossan Jr.

Approved sentence: Bad-conduct discharge, confinement for 9 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 Jefferson B. Brown.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Christa S. Cothrel.

BEFORE

BRESLIN, STONE, and EDWARDS
Appellate Military Judges

OPINION OF THE COURT

STONE, Judge:

The appellant was tried by a general court-martial composed of officer and enlisted members at MacDill Air Force Base (AFB), Florida. Pursuant to his pleas, the military judge found him guilty of wrongful use of marijuana and methylenedioxy-methamphetamine (also known as ecstasy), wrongful possession of ecstasy with the intent to distribute, and unlawfully entering the dormitory room of a female airman, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934. Court members sentenced him to a bad-conduct discharge, confinement for 9 months, forfeiture of all pay

and allowances, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

The appellant appeals his conviction on five grounds, four of which are discussed below.[1] First, he contends the military judge erred in granting the prosecution's challenge for cause against a court member. Second, he argues two letters of reprimand were improperly admitted. Third, he contends the military judge gave an improper sentencing instruction. Lastly, he avers there was error in the addendum to the staff judge advocates recommendation (SJAR). We find no merit to these assignments of error for the reasons set forth below.

I. Challenge for Cause

During voir dire, one of the appellant's attorneys asked for the opportunity to question Lieutenant Colonel (Lt Col) Ho outside the presence of the other members. Defense counsel's voir dire revealed that Lt Col Ho had read news reports describing the punishment two Air Force members received for offenses involving ecstasy. Defense counsel's voir dire also revealed that Lt Col Ho, while assigned to another base, attended a commander's call where ecstasy was discussed. Portions of Lt Col Ho's discussions with counsel and the military judge are set forth below.

> DC: After you read the Early Bird [a collection of military-related news articles disseminated throughout military channels] regarding what happened to [a cadet who was prosecuted for use and distribution of ecstasy] what affect [sic] did that have on you? What did you think about what happened?
>
> MBR [Lt Col Ho]: The inference that I received from that article was that the Air Force has a zero tolerance as far as ecstasy. There was also another case that I read about in Langley where a First Lieutenant Medical Officer was also charged with the use and distribution of ecstasy. He also received a similar sentence of a prison term and discharge.
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> DC: Have you discussed either of those [news articles] with anybody?
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> MBR [Lt Col Ho]: Well, basically with my wife, and that was it. It's not hard to make the news, when you see in Tampa and Ybor City it's probably the place popular for ecstasy. I mean, it's the society we live in, it's a cultural shift.

[1] Pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), the appellant alleges his defense attorneys provided ineffective assistance of counsel. We have reviewed the record carefully and in considerable detail and conclude this assignment of error is without merit.

DC: Can you explain for me, please, or clarify what effect those two incidents that you learned about--what they had on you as a person? How did you feel about what you read?

MBR: [Lt Col Ho]: I really can't say anything, because personally I've never come in contact with someone that has done that. Like anything else, I mean, it's where society has taken us. It's basically been known all due to the--just like transgressions that are occurring everyday. It's--I don't know. It's hard to explain, because--what is the certain level of punishment for the different offenses, you know? Who knows? I can't say.

DC: The other area, sir, that I spoke to you earlier about, was that commander's call or the information that you received.

MBR [Lt Col Ho]: Right.

DC: Do you remember what effect that had on you, the information that you got from the commander's call?

MBR [Lt Col Ho]: That was just the same briefing as--basically, I got it from the commander's call. Ecstasy, like any drug is against good order and discipline of the military.

The trial counsel then had the opportunity to follow-up with Lt Col Ho.

TC: With regards [sic] to the two articles that you read, given that you read those two articles, do you have any predisposed notion as to what penalty, what sentence, should be imposed here today? Has it caused you to come in here with a preconceived set punishment, without hearing the evidence?

MBR [Lt Col Ho]: I could say that the Air Force--by the actions those previous boards have given out to those two individuals that the Air Force has a zero tolerance policy. Whether that's right or wrong, it's not my place to judge. I raised my right hand to defend the United States. It depends. I mean, several years ago, an offense like this would probably have been treated to--the person probably would have been sent to rehab, and then brought back onto the active role. Society has changed. Everything is situation dependent. I mean, as you know the Air Force, and the military in general, is having a recruiting/retention problem. You would have to wonder where is the military going, if they're convicting and

imprisoning individuals based on the use of ecstasy. That is probably the impression that it's leaving on military personnel, that they are not accepting the use of that type of drug as conducive to good military order and discipline in the military.

MBR [Lt Col Ho]: Would you say that influenced me or not, it's not for me to say. Like I say, it's situation dependent. It depends who--from my experience sitting on boards, you know, it's depending on your board makeup. It seems that more of your senior NCOs are a lot harsher on their younger troops, versus the junior officers. That's my experience, in the way you look at it.

MBR [Lt Col Ho]: From what I've observed, most of the folks that are sitting on the board have lived blessed lives. They have been blessed in the military to be fortunate to have great careers, and good careers, in the military. In response, they may give jade [sic] to the fact that the punishment they hand out are [sic] just in their point of view.

TC: I guess what I'm getting at, sir, will you consider a full range of punishment?

MBR [Lt Col Ho]: Yes.

After the trial counsel concluded his questions, the military judge then questioned Lt Col Ho about the Air Force's policy on drugs:

MJ: You mentioned that Air Force policy is zero tolerance. I previously instructed the members that policy has no place in this courtroom.

MBR [Lt Col Ho]: That's correct.

MJ: Can you separate that policy from the acts here in this courtroom and the decisions you will have to make, or do you feel that policy is binding upon you?

MBR [Lt Col Ho]: I'm in the aviation career field, and the problem I would have at this point in time is, if I had a mechanic working on my airplane that was under the influence of a substance, then he's not only jeopardizing my life but the rest of my crewmembers' lives. That's the way--I would have somewhat of a problem separating myself from the Air Force policy.

MJ: If I instruct you to not consider the Air Force policy, would you be able to follow that instruction.

> MBR [Lt Col Ho]: I would be able to follow that instruction, if you instructed me to do that.

The trial counsel challenged Lt Col Ho for cause based on his inconsistent responses to questions about separating himself from the Air Force's drug policies. The military judge granted the challenge for cause over defense objection, stating:

> MJ: Having viewed Colonel Ho throughout the group *voir dire* and the individual *voir dire*, and listening to his answers and the variance in those answers, even though he did state that he would yield to the evidence and the instructions as given, I'm going to grant the challenge on an actual bias basis.

Rule for Courts-Martial (R.C.M.) 912(f)(1)(N) provides: "A member shall be excused for cause whenever it appears that the member . . . should not sit as a member in the interest of having the court-martial free from substantial doubt as to legality, fairness, and impartiality." The burden for establishing grounds for a challenge is "upon the party making the challenge." R.C.M. 912(f)(3). Military judges should be "liberal in granting challenges for cause." *United States v. Rome*, 47 M.J. 467, 469 (1998).

The test for actual bias is whether any bias "is such that it will not yield to the evidence presented and the judge's instructions." *United States v. Reynolds*, 23 M.J. 292, 294 (C.M.A. 1987). "Actual bias is a question of fact. Accordingly, the military judge is given great deference on issues of actual bias, recognizing that he or she 'has observed the demeanor of the' challenged party." *United States v. Warden*, 51 M.J. 78, 81 (1999), (citing *United States v. White*, 36 M.J. 284, 287 (C.M.A. 1993)). We will reverse only for a "clear abuse of discretion." *White*, 36 M.J. at 287. Issues of actual bias are viewed subjectively, through the eyes of the military judge. *United States v. Schlamer*, 52 M.J. 80, 93 (1999).

Applying the foregoing principles, we hold the military judge did not abuse his discretion in granting the challenge for cause. Lt Col Ho provided rambling and confusing responses to the questions of the trial and defense counsel, thus making the military judge's assessment of his demeanor that much more critical. When the judge attempted to clarify, Lt Col Ho's frank response was that he would have "somewhat of a problem" separating himself from the Air Force policy. Even though Lt Col Ho said he would follow an instruction to disregard Air Force policy, the military judge took into account his demeanor throughout the entire voir dire process in making his determination of actual bias. Given the voir dire as a whole, the less than emphatic answers Lt Col Ho otherwise made about his ability to sit fairly and objectively, and the liberal grant mandate, we hold the military judge did not abuse his discretion in granting the challenge for cause.

II. Admissibility of Letters of Reprimand

Pursuant to R.C.M. 1001(b)(2), the government offered a number of properly authenticated documents reflecting the appellant's past military efficiency and history. These documents included three letters of counseling (LOC), four letters of reprimand (LOR), an Air Force Form 3070 reflecting nonjudicial punishment imposed pursuant to Article 15, UCMJ, 10 U.S.C. § 815, and an Air Force Form 366 reflecting vacation of suspended nonjudicial punishment. The appellant avers that the military judge erred in admitting two of the LORs. We disagree for the reasons below.

The first LOR, dated 27 April 1999, was for failing to go to a mandatory appointment on 23 April 1999. The LOR was administered by Captain (Capt) Hall, the squadron operations officer at MacDill AFB. The appellant signed the letter acknowledging he received a copy and that he had three days to respond to the letter. He further acknowledged, "Any comments or documents I wish to be considered concerning this LOR will be included in my response." His endorsement to the LOR did not expressly state he intended to respond to the allegation.

The second document is an LOR dated 5 December 1999 and issued by Technical Sergeant (TSgt) Witzleb, the appellant's team leader while he was deployed to Saudi Arabia. Apparently the LOR was issued during the last few days of his deployment. It alleges the appellant showed up 30 minutes late for an out-processing appointment. The appellant acknowledged receipt and marked a pre-printed line in the endorsement indicating he wanted "to respond and will do so not later than 3 days."

At trial, the defense counsel made an offer of proof to the military judge that the appellant had in fact responded in writing to the two reprimands. Defense counsel argued that the "rule of completeness" required the government to produce and submit the appellant's responses before the LORs could be admitted. In response, the trial counsel emphatically denied that the appellant ever responded to the two reprimands. As a result, the military judge allowed the government to offer evidence on the issue.

The government called Capt Hall, the author of the first LOR. He testified that the appellant did not respond to the LOR, and that he reached this conclusion "[b]ecause of two reasons: One, if I had received a response, I would have initialed it and included it in his PIF; and two, I never received a written response or any other type of response from Airman Caminiti on any action I've taken against him." As to the LOR issued by TSgt Witzleb, the trial counsel did not produce any additional testimony or evidence.

The military judge first ruled on the LOR signed by Capt Hall.[2] After applying the balancing analysis found in Mil. R. Evid. 403, he noted that Capt Hall's testimony provided evidence of how such documents were administratively processed in the squadron. He further noted that there was no "testimony" that the appellant ever provided a response, and the mere possibility that a response existed was insufficient grounds to preclude admission of the LOR issued by Capt Hall.

The military judge also admitted the LOR signed by TSgt Witzleb. Applying the Mil. R. Evid. 403 balancing test, he noted that, aside from the appellant's indication on the LOR that he wanted to respond, there was "nothing before the court to indicate" the appellant had actually provided a written response.

We begin our analysis by noting that a military judge's evidentiary rulings in presentencing proceedings ordinarily will be overturned only for a clear abuse of the judge's broad discretion. *United States v. Hursey*, 55 M.J. 34, 36 (2001). This review is less deferential if the military judge does not articulate on the record whether the evidence is more probative than prejudicial using the balancing analysis under Mil. R. Evid. 403. *Id*.; *United States v. Manns*, 54 M.J. 164, 166 (2000).

R.C.M. 1001(b)(2) permits the prosecution to present personnel records, provided they are "made or maintained in accordance with departmental regulations" and the records "reflect the past military efficiency, conduct, performance, and history of the accused." Air Force Instruction 51-201, *Administration of Military Justice,* (2 Nov 1999), implements, in paragraphs 8.5.1 and 8.5.2, this provision with regard to documents found in a personal information file (PIF). The regulation provides that personnel records from a PIF are admissible if: (1) Opposing counsel is provided a copy of the record prior to trial; (2) There is some indication on the correspondence that the accused was served a copy and had the opportunity to respond to the allegation; and (3) The document is not more than five years old on the date of referral. We are also mindful that R.C.M. 1001(b)(2) requires the military judge to determine the admissibility of a document if it is "incomplete in a specified respect."

It is apparent from the military judge's ruling that he concluded the LORs were complete and that no responses were ever submitted. Certainly, defense counsel's mere proffer that the appellant responded to the LOR issued by Capt Hall was insufficient to overcome Capt Hall's testimony about how he handled such documents.

Determining whether the appellant responded to TSgt Witzleb's LOR is a harder question, especially since it was issued on the eve of the appellant's departure from Saudi Arabia and he clearly indicated he intended to respond. Capt Hall's testimony did not

[2] Due to a misunderstanding about which exhibit the defense was objecting to, the military judge admitted the LOR from Capt Hall when it was first offered. Thus, he "reconsidered" his ruling on that exhibit.

address the processing of disciplinary actions initiated by others. We find it significant, however, that the record reveals the appellant did not respond to any of the numerous documents found in his PIF.

We are satisfied that the documents in question were complete. However, even if it were not so, the rule of completeness is not to be applied mechanically. That is, the rule does not automatically foreclose the admission of a document that is not complete in every respect. Instead, "if an accused objects to a particular document as . . . incomplete in a specified respect . . . the matter shall be determined by the military judge." R.C.M. 1001(b)(2). Similarly, Mil. R. Evid. 106 provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement *which ought in fairness* to be considered contemporaneously with it." (emphasis added.)

Assuming the appellant responded to either LOR, it is difficult to measure prejudice because the appellant failed to identify the content of the purported responses. For example, he could have denied the allegation, offered an affirmative defense, or simply admitted wrongdoing with apologies and promises to do better in the future. Mil. R. Evid. 103 requires both a timely objection and an offer of proof. The appellant proffered there was a response, but provided nothing for the military judge or this Court to consider in testing for prejudicial effect. Thus, we conclude the military judge did not abuse his discretion.

Finally, we conclude that it is highly unlikely the court members were unduly influenced by either LOR. These are exceptionally minor infractions, especially in the context of the charged offenses. Moreover, they do not significantly alter the overall picture of the appellant's military history and character given the wealth of other documentation reflecting the appellant's disciplinary history. Lastly, the defense had the opportunity to respond to these documents at trial. Under these circumstances, even if we assumed the two LORs were inadmissible, any error would be harmless.

III. Sentencing Instructions

The appellant next challenges a sentencing instruction given over his objection. During his unsworn statement, the appellant told the members:

> I worked for OSI [the Air Force Office of Special Investigations] and bought ecstasy pills from Airman Basic Moore, while OSI watched. I believe Airman Basic Moore was supplying a lot of ecstasy on base. Soon afterwards, as a result of my and another airman's efforts, Airman Basic Moore was arrested, court-martialed and convicted. He was sentenced to reduction to airman basic, total forfeitures, nine months confinement, and a bad conduct discharge. I guess I cannot blame him for coming in and

trying to testify against me. I helped put him in jail. I know you are not bound by this decision, I just ask for the same leniency.

During an Article 39(a), UCMJ, 10 U.S.C. § 839(a) hearing to discuss sentencing instructions outside the presence of the court members, the trial counsel asked the military judge to provide the members with an instruction nearly identical to the one approved by this Court in *United States v. Friedmann*, 53 M.J. 800 (A.F. Ct. Crim. App. 2000), *pet. denied*, 54 M.J. 425 (2001). Over defense objection, the military judge agreed to give the instruction as it pertained to sentence comparison.

On appeal, the appellant argues there are two "notable differences" between his case and the circumstances found in *Friedmann*. First, he notes that there was no defense objection in the *Friedmann* case, and thus, that case was reviewed under a plain error analysis. Second, he suggests that his comments about Airman Basic (AB) Moore were not offered for the purpose of sentence comparison, but rather to show how he assisted the government in its ongoing drug investigations.

The issue of whether court members are properly instructed is a question of law that we review de novo. *United States v. Maxwell*, 45 M.J. 406, 425 (1996). We conclude that the appellant's request to be given the "same leniency" as AB Moore was clearly an effort to get the court members to engage in sentence comparison. When an appellant attempts to engage in sentence comparison, a "military judge does not err in providing the court members [with] accurate information on how to appropriately consider those matters in their deliberations." *Friedmann*, 53 M.J. at 804. *See also United States v. Grill*, 48 M.J. 131, 132 (1998). Applying a de novo standard of review to these facts, we conclude that the military judge did not err in giving the instruction.

IV. Addendum to the Staff Judge Advocate's Recommendation

R.C.M. 1106(d)(3)(C) requires a staff judge advocate (SJA) to provide "concise information" about the accused's "character of service" as part of the post-trial staff judge advocate recommendation (SJAR). In this case, the SJAR described the appellant's character of service as "dishonorable." A transmittal letter from the appellant's commander to the special court-martial convening authority also characterized the appellant's service as "dishonorable."

The appellant and his counsel received a copy of the SJAR and responded pursuant to R.C.M. 1106(f)(4). This provision authorizes counsel for an accused to "submit, in writing, corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and may comment on any other matter." Appellant's defense counsel took issue with the characterization of his client's military service as "dishonorable," suggesting it was misleading and unfair to describe the

appellant's service in such harsh terms. He went on to highlight the positive aspects of his client's duty performance as described in a performance report.

The defense counsel's letter and the appellant's other clemency matters were forwarded to the convening authority along with an addendum to the SJAR. This addendum referenced all the matters submitted by the appellant and emphasized to the convening authority that he "must" consider them prior to taking action. The addendum also stated that the defense counsel noted "no errors" in the SJAR.

The appellant avers that the "failure of the staff judge advocate to correct or at least comment [on the] Appellant's objection to this 'characterization' was prejudicial error." In addition, he argues that the "no errors" comment in the addendum was prejudicial because it "undercut" his request that a "punitive discharge not be approved in his case."

In order to resolve claims of error connected with a convening authority's post-trial review, our superior court has established the following requirements: "First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (1998).

R.C.M. 1106(f)(7) states that an SJA "*may* supplement the recommendation after the accused and counsel for the accused have been served with the recommendation and given an opportunity to comment." (emphasis added.) However, nothing in the rule or our case law requires an SJA to comment on the R.C.M. 1105 clemency submissions unless the clemency submission raises a "legal error." R.C.M. 1106(d)(4) states:

> [W]hen the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning the legal errors is not required.

A disagreement as to how to describe the appellant's service is not a "legal error" and thus did not require any comment from the SJA in his addendum. *See generally United States v. Hamilton*, 47 M.J. 32 (1997) (drawing a distinction between the convening authority's duty when acting on matters of clemency and the convening authority's statutory role vis-à-vis defense claims of legal error). Thus, the failure of the

SJA to address the appellant's specific concerns about the characterization of his service in the addendum was not error.

Nor do we find the SJA's neutral comment that the defense counsel raised "no errors" misleading. The addendum to the SJAR specifically listed the defense counsel's letter and emphasized to the convening authority his duty to read all of the matters the appellant provided. As a result, the appellant truly had the "last word" on the matter.

We also find no merit to the appellant's argument that his chance for clemency on his punitive discharge was affected by the addendum. Contrary to appellate defense counsel's assertions, the appellant made very clear that the only relief he sought was a reduction in confinement. In fact, the appellant stated he was not asking that his punitive discharge be disapproved: "I'm not asking for you to change my discharge or forfeitures of all pay and allowances. I respectfully ask for a reduction in my confinement time so that I can start to take steps to repair my life [and go to school]."

Furthermore, the appellant has not met his burden of establishing what he would have said in response to the SJA's statement that there was "no error" other than to repeat the arguments that were included in his original submissions to the convening authority. The only possible response would have been to point out that he did, in fact, allege an error. Since it was already clear that the appellant disagreed with the characterization of his service, we conclude that the addition of that information would not have led to a different result in the convening authority's action. We hold there was no error and no prejudice.

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

AFFIRMED

BRESLIN, Senior Judge (concurring):

I concur in the lead opinion. I write separately only to note a more fundamental reason why the appellant's allegation of error regarding the challenge for cause of Lt Col Ho is without merit.

As noted above, the military judge granted the challenge for cause; therefore Lt Col Ho did not sit on the court-martial. I fail to see how the appellant's right to a fair trial could be prejudiced by the absence of a specific court member due to a challenge for

cause. The appellant has no right to have a specific court member sit on his case, nor has he shown that the remaining members were not fair and impartial. This is not at all like the situation in *Batson v. Kentucky*, 476 U.S. 79 (1986), and its progeny, which prohibit the use of peremptory challenges to exclude persons from a jury for an unlawful purpose. For this reason, I would reject the assignment of error.

OFFICIAL

HEATHER D. LABE
Clerk of Court