

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

**Airman Basic JACOB A. DILL
United States Air Force**

ACM S31211

30 January 2008

Sentence adjudged 05 October 2006 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Gary Jackson.

Approved sentence: Bad-conduct discharge and forfeitures of \$849.00 pay per month for three months.

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

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Captain Jason M. Kellhoffer.

Before

**FRANCIS, SOYBEL, and BRAND
Appellate Military Judges**

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SOYBEL, Judge:

The appellant was found guilty, in accordance with his pleas, of one specification of use of ecstasy, one specification of distribution of ecstasy, one specification of attempted use of ecstasy, and one specification of attempted distribution of ecstasy, in violation of Articles 112a and 80, UCMJ, 10 U.S.C. §§ 912a, 880. He was sentenced to forfeit \$849.00 per month for three months and a bad-conduct discharge. He raises two issues on appeal; one related to the sentencing worksheet used at trial and another related to the special court-martial order.

Sentencing Worksheet Error

During the pre-sentencing phase of his trial the military judge gave the members sentencing instructions that included the punishment of restriction. Part of that instruction read: “For such a penalty, it is necessary for the Court to specify the limits of the restriction and the period it is to run.” The military judge also provided the members the same instruction in writing while they were deliberating on the sentence. However, the military judge also provided the members with a sentencing worksheet, which read: “TO BE RESTRICTED TO THE LIMITS OF YOUR BASE FOR A PERIOD OF _____ (days) (months).” There was no objection to this language by the defense and neither the appellant nor his trial defense counsel submitted post-trial matters addressing this issue to the convening authority prior to his taking action.

On appeal the appellant now asserts the military judge committed plain error by removing the member’s sentencing discretion when he designated Sheppard Air Force Base as the location for any adjudged restriction. We find no merit in this argument.

Normally, a failure to object at trial constitutes waiver of the issue unless there was plain error. *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F. 2001); *United States v. Boyd*, 55 M.J. 217, 222 (C.A.A.F. 2001). To constitute plain error the appellant must show there was error, that the error was plain, and that the error materially prejudiced a substantial right. *United States v. Fisher*, 21 M.J. 327, 328 (C.M.A. 1986). Furthermore, the error must be viewed in the context of the particular case. *Id.* To do so, the appellant’s claim must be evaluated against the entire record. Even assuming that error occurred and it was plain, we do not find material prejudice to a substantial right.

First, the members were given proper instructions, both orally and in writing, that the limit of any restriction was to be determined by them. Next, the military judge’s instructions were clear that the purpose of the worksheet was to aid the members “in putting the sentence in proper form.” It was also made clear that the form was to be employed after the voting on sentence was complete. Thus, the error would not have influenced the member’s deliberative process and would have no impact unless restriction was part of the sentence. Finally, we note the sentence lacked any confinement or restriction whatsoever.

Assessing the error in the context of this case, considering the evidence in extenuation and mitigation, the seriousness of the offenses, and the relatively light sentence adjudged by the members, we do not agree the mistake in the sentencing worksheet constituted plain error justifying reversal in spite of the lack of timely objection.

Promulgating Order

The special court-martial order in this case incorrectly indicates the appellant was found guilty of a violation of Article 112a, UCMJ, regarding Specifications 1 and 2 of the Charge. However, because the appellant pled to, and was found guilty of the lesser included offenses of attempted use and attempted distribution of ecstasy, the order should indicate these were violations of Article 80, UCMJ.

Conclusion

The 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). We order the promulgation of a corrected Court-Martial Order, indicating Specifications 1 and 2 were violations of Article 80, UCMJ. The findings and sentence are

AFFIRMED.

OFFICIAL



Christina E. Parsons
CHRISTINA E. PARSONS, TSgt, USAF
Deputy, Clerk of the Court