UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman THOMAS M. GORENCE
United States Air Force

ACM S30296

18 May 2004

Sentence adjudged 9 January 2003 by SPCM convened at Lackland Air Force Base, Kelly Annex, Texas. Military Judge: Patrick M. Rosenow (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 3 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major Linette I. Romer.

Before

STONE, MOODY, AND JOHNSON-WRIGHT
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

In accordance with his plea of guilty, the appellant was convicted of a single use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge, sitting alone as a special court-martial, sentenced the appellant to a bad-conduct discharge, confinement for 3 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. The sole issue before this Court is whether the military judge erred in admitting testimony from the appellant's mother concerning his pre-service marijuana use. Finding no error, we affirm.

I. Background

In August of 2002, the appellant attended a party in San Antonio, Texas, where he smoked cigarettes laced with cocaine. Soon thereafter, he was randomly selected to provide a urine sample for drug testing. Laboratory tests yielded a positive result for cocaine.

After the appellant entered a provident plea to this offense, the government offered documentary evidence from the appellant's personnel record reflecting three minor disciplinary infractions during his 13 months of military service. The government also called a special agent from the Air Force Office of Special Investigations who discussed the details of the appellant's confession to cocaine use.

After the government rested, the appellant offered evidence of mitigating and extenuating circumstances. In addition to providing an unsworn statement, he offered several documents from co-workers and supervisors attesting to his rehabilitative potential. He also provided the military judge with letters of support from family members and family friends.

Additionally, the appellant's mother was called as a witness and testified as to the appellant's interests and upbringing. She also advised the military judge that her son would have a home to return to if he was no longer in the military. Defense counsel then asked Ms. Gorence whether her son learned from his mistakes, to which she affirmatively replied. He then asked, "Do you have any opinion as to whether your son has any rehabilitative potential?" She replied that she did and went on to explain that her son was not a malicious person and that his cocaine use was an "error in judgment" that he no doubt would learn from.

At the conclusion of Ms. Gorence's direct examination, the trial counsel declined to cross-examine her. The military judge, however, asked Ms. Gorence a series of questions about her understanding of her son's plans for his life and whether he had been happy with his Air Force job. He then asked the following questions about the people her son had associated with prior to entering the military:

> Q: [Y]ou had no concerns about the people he was hanging around with?
>
> A: Not normally, no. Every once in a while, you know, somebody would do something stupid, and I would say, you know, guys, get it together, because I'll call you on it. Right?
>
> Q: Right. I'm trying to figure out –

A: He didn't hang out with the jocks, and he didn't hang out with the computer geeks. He's always been somewhat of a loner . . . .

Q: Okay. Because at least from the evidence I've got so far, it appears the folks that he was hanging out here with … weren't doing him any favors.

A: No. And that was –

Q: And that's one concern I have if [he] comes back to you. I mean, did he have a history of kind of hanging out with those folks, or maybe it was just because he was here in San Antonio and didn't really know anybody else?

A: I have a feeling that was probably the case.

Q: And did you have any concerns from his prior history of any sort of substance problems as far as alcohol beyond I guess what you would normally expect of high school kids?

A: Nothing beyond what normal high school kids get involved with, no.

Upon completion of the military judge's questioning, the trial counsel posed the following question:

Q: Do you know if your son ever used marijuana while he was in high school?

A: He probably –

[Defense Counsel] DC: Objection, Your Honor. This is going into uncharged misconduct.

[Military Judge] MJ: Well, the problem is you've got the judge asking questions and I – you know, I was mostly thinking about alcohol as much as anything else. I didn't realize I was wandering into uncharged misconduct territory. Probably that would have been the better place for you to object there when I said, you know -- .

I tell you what, I'm going to overrule the objection, but only to the extent – and you can rest assured, I'm not going to consider it for any uncharged misconduct purposes. But to the extent it would only weigh to rebut the question I asked. Okay. So I asked – I asked the question about did you have any – have any reason to suspect the history of any sort of substance

abuse. And, you know, there wasn't any objection to that. I certainly had no reason to know what the answer was going to be . . . .

[M]y suspicion is the witness is going to say no, because that's what she told me, but I'll go ahead and allow you to ask the question. But, it's a bench trial, you don't have to worry about non 403-type [sic] uses. I'm only going to use – if I consider it at all, and it will depend on the answer, it will be for a very limited purpose which I'll put on the record. Go ahead.

[TC]: Ma'am, again, do you know or are you aware that your son ever used marijuana?

A: I believe he tried it at some point because he's a normal high school kid. You know, but as far as continual use or – no. No.

The military judge then said that he would not "impose any other punishment for an experimental use in high school. But I will consider it in the context of everything else." After announcing his sentence, the military judge noted that the appellant was an "ideal" candidate for the Air Force Return to Duty Program, a rehabilitation program that allows court-martialed airmen to return to duty upon successful completion of its rigorous requirements. He recommended that the convening authority approve such a course of action.[1]

II. Discussion

On appeal, the appellant does not question either the accuracy of his mother's statement about his pre-service drug use or the propriety of the military judge asking his mother about whether he had any "substance abuse problems as far as alcohol." *See generally United States v. Cephas*, 25 M.J. 832, 833 (A.C.M.R. 1988) (military judge may properly ask questions of any witness to clear up uncertainties in evidence and to develop further facts for a better understanding of the case). Rather, the appellant claims that that it was improper for the military judge to allow the government to question Ms. Gorence about pre-service marijuana use because: (1) It did not rebut the narrow question asked by the military judge concerning alcohol use, and (2) It was the military judge—not the appellant—who "opened the door" to this rebuttal evidence, a consequence he contends is not contemplated by Rule for Courts-Martial 1001(d).

This Court reviews a military judge's ruling on the admissibility of sentencing evidence for a clear abuse of discretion. *United States v. Clemente*, 50 M.J. 36, 37 (C.A.A.F. 1999); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995); *United States*

[1] In his clemency submissions, the appellant did not apply for the Return to Duty Program. The staff judge advocate, nonetheless, properly advised the convening authority of the military judge's recommendation.

v. Zakaria, 38 M.J. 280, 283 (C.M.A. 1993); *United States v. Griggs*, 59 M.J. 712, 713 (A.F. Ct. Crim. App. 2004). When a military judge's ruling is based on an erroneous view of the law, it is generally considered an abuse of discretion. *United States v. Becker*, 46 M.J. 141 (C.A.A.F. 1997); *Griggs*, 59 M.J. at 714. The sentence of a court-martial may not be held incorrect on the ground of an error of law, however, unless the error materially prejudices the substantial rights of the accused. Article 59(a), UCMJ, 10 U.S.C. § 859(a).

Even if we assumed the military judge did not open the door with his question about whether the appellant had "any sort of substance problems as far as alcohol," other aspects of Mrs. Gorence's testimony *brought out by the defense* did make the appellant's pre-service marijuana use proper rebuttal evidence. Trial defense counsel asked Ms. Gorence whether the appellant learned from his mistakes and whether he had rehabilitative potential. Unquestionably, this opinion evidence opened the door to other information challenging the foundation of her opinion. The fact that the trial counsel's solicitation of this information came after the military judge's questioning is not significant. *See generally* Mil. R. Evid. 611(a) (military judge has broad control over mode and order of interrogating witnesses). The trial counsel's question properly clarified the foundational basis of Ms. Gorence's opinion testimony. We find nothing improper or unfair about the trial counsel's question given the door was opened to this evidence during direct.

Moreover, we are thoroughly convinced that the military judge was not inappropriately influenced by the admission of this evidence. "The prejudicial impact of erroneously admitted evidence in a bench trial is presumed to be substantially less than it might have been in a jury trial." *United States v. Cacy*, 43 M.J. 214, 218 (C.A.A.F. 1995) (citing *United States v. Cardenas*, 9 F.3d 1139, 1156 (5th Cir. 1993)) (internal punctuation and citations omitted). "Moreover, a judge, sitting as a trier of fact, is presumed to have rested his verdict only on the admissible evidence before him and to have disregarded that which is inadmissible." *Id. See also United States v. Robbins*, 52 M.J. 455, 457 (C.A.A.F. 2000).

The military judge made it clear he would not increase the punishment he imposed based upon Ms. Gorence's testimony. He was favorably impressed by the appellant's good rehabilitative potential as evidenced by his sua sponte recommendation to the convening authority that the appellant be selected for the Return to Duty Program.[2] In fact, he stated three times on the record that he "strongly recommended" the appellant for the program. Finally, we note that the maximum sentence included a bad-conduct discharge, confinement for 12 months, forfeiture of two-thirds pay per month for 12 months, and reduction to E-1. Based upon our experience, the adjudged sentence of a

[2] The military judge's optimism was misplaced. The staff judge advocate's recommendation reflects that a urine sample collected from the appellant upon his entry into confinement tested positive for marijuana.

bad-conduct discharge, confinement for 3 months, and reduction to E-1 is not harsh for this type of offense. In view of these circumstances, we find no prejudice, even if we were to assume there was error.

III. 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, 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.

MOODY, Judge (dissenting):

The military judge asked the appellant's mother about the appellant's difficulties with alcohol abuse. I believe that the information about experimental marijuana use did not logically contradict the witness' testimony that the appellant's history with alcohol was nothing beyond that of the average high school student. Consequently, I believe that it was not relevant. *See United States v. Cousins*, 35 M.J. 70 (C.M.A. 1992). Furthermore, insofar as the military judge stated that he would take the prior use into account in his deliberations on sentencing, I believe that the admission of this evidence was an error to the material prejudice of the substantial rights of the appellant. Article 59(a) UCMJ. I would correct the error by performing sentence reassessment.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator