UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class SUSANNA K. LOZANO
United States Air Force

ACM S32043

19 September 2013

Sentence adjudged 9 March 2012 by SPCM convened at Holloman Air Force Base, New Mexico. Military Judge: Joe W. Moore.

Approved Sentence: Bad-conduct discharge, confinement for 14 days, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Rhea A. Lagano; and Gerald R. Bruce, Esquire.

Before

STONE, ROAN, and SARAGOSA
Appellate Military Judges

OPINION OF THE COURT

PER CURIAM:

The appellant was tried by a special court-martial composed of officer members. In accordance with her plea, she was found guilty of one specification of wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consisted of a bad-conduct discharge, confinement for 14 days, reduction to the grade of E-1, and a reprimand. On appeal the appellant asserts her counsel was constitutionally ineffective, the military judge committed plain error by allowing uncharged misconduct and improper argument, and that her sentence, including a bad-conduct discharge, is inappropriately severe.

Background

The record of trial reflects the appellant pled guilty to a one-time use of cocaine. During the *Care*[1] inquiry, she admitted that in early November 2011, she attended a party off base with a friend, Airman First Class (A1C) RM, and two civilians. The appellant, A1C RM, and one of the civilians left the party and proceeded to another off-base house where the civilian purchased cocaine. The civilian returned to the vehicle, broke up the substance on a CD case with an ID card, and cut it up into lines. Each of the three of them snorted a line of cocaine through a rolled-up dollar bill provided by the civilian. A recording of the appellant's *Care* inquiry was presented to the members during the sentencing portion of the case. The appellant's version of events included a statement that her portion or line of cocaine was "extremely small" compared to A1C RM's and the civilian's. She also told the military judge she felt pressured to use the cocaine due to A1C RM's insistence she do so.

During the sentencing case, the prosecution called A1C RM as a witness. He corroborated the basic facts of that evening and the appellant's use of cocaine; however, he contradicted other aspects of her version of events. He testified that the amount of cocaine she used was the same as his and the civilian's, and that he asked her only once if she wanted to use it. He further elaborated on the facts of that evening by testifying that the civilian obtained the cocaine and came back to the vehicle, and then they began to drive back to the party. He testified that while driving back, the civilian broke the cocaine into three lines. "[The civilian] did a line while we're driving back to the party. Airman Lozano did a line. And I did a line while we were driving." When the trial counsel asked how he did a line while driving, A1C RM replied, "[Airman Lozano] held the steering wheel."

Evidence in Aggravation

The appellant asserts the military judge committed plain error in two ways: first, by allowing the introduction and argument of improper aggravation evidence; and second, by failing to correct trial counsel's improper sentencing argument in support of a bad-conduct discharge. No objections were raised at the time of trial to either issue.

In the absence of an objection at the time of trial, decisions to admit evidence are reviewed for plain error. *United States v. Lewis*, 69 M.J. 379, 383 (C.A.A.F. 2011); *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). In order for the appellant to prevail under a plain error analysis, she must show: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000); *United States v. Finster*, 51 M.J. 185, 187 (C.A.A.F. 1999).

[1] *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

Beginning with the alleged improper aggravation evidence, we must first determine whether there was error. Rule for Courts-Martial (R.C.M.) 1001(b)(4) authorizes the trial counsel to present evidence as to any aggravating circumstance directly relating to or resulting from the offenses of which the accused has been found guilty. As such, "[t]here are two primary limitations on the admission of aggravation evidence. First, such evidence must be 'directly relating' to the offenses of which the accused has been found guilty." *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). "The second limitation is that any evidence that qualifies under R.C.M. 1001(b)(4) must also pass the test of Military Rules of Evidence 403, which requires balancing between the probative value of any evidence against its likely prejudicial impact." *Id*.

Historically, military courts have interpreted the meaning of "directly related" to be a function of how strong the nexus is between the proffered uncharged misconduct and the offenses of which the accused has been convicted. *Id*. Our superior court has asserted this connection must be direct and "closely related in time, type, and/or often outcome, to the convicted crime." *Id*. at 281-82.

In this case the purported uncharged misconduct consists of testimony that after the appellant snorted the line of cocaine, for which she was convicted, she handed the CD case with the final line of cocaine on it to A1C RM and then held the steering wheel while he snorted the cocaine. These acts, the appellant argues, amount to uncharged conspiracy, reckless endangerment, dereliction of duty, or aiding and abetting, and do not fit into the prescribed limitations of aggravation evidence. We disagree.

The appellant's acts of handing the CD case with cocaine on it to A1C RM, and then holding the steering wheel for a brief moment while he snorted the line of cocaine, were part and parcel of the appellant's own use of cocaine. These acts occurred at the same time and place, and were of the same type. Two airmen and a civilian left a party together, drove to another location to obtain cocaine together, and used the cocaine in the vehicle together. The facts of appellant's use of cocaine are interwoven with the facts surrounding the trio and what happened that evening in the vehicle, which includes her passage of the CD case and holding the steering wheel. We find this is exactly the type of aggravating evidence anticipated by R.C.M. 1001(b)(4)'s limitation that it be "directly related." The prosecution may properly present the complete facts as matters in aggravation, including the *res gestae* of the appellant's crime, without surgically removing those facts that paint the appellant in a negative light and could have been separately charged but were not.

Additionally, we do not find the probative value of such aggravating matters to be substantially outweighed by the prejudicial impact of the same. Accordingly, we find no error. Finding no error in the admission of the uncharged misconduct evidence discussed

above, there can also be no error in allowing the trial counsel to argue these facts during sentencing argument.

Trial Counsel's Argument

The appellant asserts the military judge erred by failing to correct trial counsel's improper argument in support of a bad-conduct discharge. In essence, she alleges the argument was improper because it blurred the lines between a punitive discharge and an administrative separation. As stated previously, there was no defense objection to the argument.

"Failure to object to improper argument before the military judge begins to instruct the members on sentencing shall constitute waiver of the objection." R.C.M. 1001(g). To overcome such waiver and warrant appellate relief, the appellant must establish plain error and material prejudice to the substantial rights of the appellant. *United States v. Jenkins*, 54 M.J. 12, 19 (C.A.A.F. 2000) (citing *United States v. Powell*, 49 M.J. 460, 464-65 (C.A.A.F. 1998)). In reviewing an argument for error, the argument "must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)).

It is improper to blur the lines between a punitive discharge and administrative separation. *United States v. Motsinger*, 34 M.J. 255, 256 (C.A.A.F. 1992). In the case at hand, the trial counsel's argument began by recommending an "appropriate sentence" that included a bad-conduct discharge. Trial counsel went on to assert that a bad-conduct discharge "is an extremely severe sentence." From that point forward, however, trial counsel repeatedly argued to the members that a bad-conduct discharge would be an appropriate service characterization. Appellant asserts this was improper and blurred the lines between a punitive discharge and an administrative separation, in violation of the principle set forth in *Motsinger*. We disagree.

Trial counsel argued:

> On the piece of paper that a military member will get that describes what kind of service they had, a bad conduct discharge will put a big red X, sound of a buzzer, on that piece of paper to say in the very short time that you were in the Air Force with us, your service was not good.

Trial counsel went on to describe the facts of the appellant's use of cocaine and asserted:

> That's what her service should be characterized as. It's bad conduct. Because I think we'd all agree that's the definition of what bad conduct is. So it characterizes her service.
>
> The military judge had instructed the members:
>
> A bad conduct discharge is a severe punishment and may be adjudged for one who in the discretion of the court warrants severe punishment for bad conduct.

While the phrase "service characterization" is typically used within the context of an administrative separation, it is not reserved for that scenario. The proper instruction to the members plainly states a bad-conduct discharge may be adjudged as punishment for one who commits bad conduct. We do not find the trial counsel's comments characterizing her use of cocaine as "bad conduct," and then arguing that the bad-conduct discharge would appropriately characterize her service, to be out of line with the instruction.

The next portion of trial counsel's argument focused on the stigma of a bad-conduct discharge and its resulting loss of benefits:

> So it's by design that the characterization of your service follows you. And when you serve well, when you serve honorably, when you serve good, you get benefits from that.
>
> . . . .
>
> But people who serve poorly, the exact opposite is true.
>
> The military judge had instructed the members:
>
> You are advised that the stigma of a bad conduct discharge is commonly recognized by our society. A punitive discharge will place limitations on employment opportunities and will deny the accused other advantages which are enjoyed by one whose discharge characterization indicates that she has served honorably.

In closing the portion of the argument focused on a bad-conduct discharge, trial counsel stated:

> So while it is a serious punishment, let's be realistic about what it is and what it does.

At no point did the trial counsel suggest that the issue was retention versus separation, and he made no effort to equate the punitive discharge with a means of separation. Instead, he focused on characterizing the appellant's offense as "bad conduct," equating that to characterizing her service as bad conduct, and then argued that a sentence including a bad-conduct discharge appropriately characterized her service. We find no error in this argument.

We also find that, taken in context of the entire court-martial, the military judge's instructions to the members before the argument prevented any confusion that may have been caused by the use of the phrase "service characterization," typically associated with an administrative separation. Furthermore, those instructions were reiterated in full during trial defense counsel's argument and provided in writing to the members to refer to during deliberations. As such, we find no error, and also find no prejudice to the substantial rights of the appellant.

Ineffective Assistance of Counsel

Appellant relies on *Strickland v. Washington*, 466 U.S. 668 (1984) to assert that she was denied her constitutional right to effective assistance of counsel. She asserts her trial defense counsel was ineffective for failing to object during the questioning of A1C RM when uncharged misconduct was elicited. She also contends her trial defense counsel was ineffective for failing to object during trial counsel's sentencing argument, which highlighted this uncharged misconduct, and made references she believed blurred the lines between a punitive discharge and administrative separation. Again, we disagree.

The Sixth Amendment[2] entitles criminal defendants to the "effective assistance of counsel" – that is, representation that does not fall "below an objective standard of reasonableness" in light of "prevailing professional norms." *Strickland*, 466 U.S. at 686-88. Inquiry as to an attorney's representation must be "highly deferential" to the attorney's performance and employ "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. "In order to prevail on a claim of ineffective assistance of counsel, an appellant must demonstrate both (1) that his counsel's performance was deficient, and (2) that this deficiency resulted in prejudice." *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland*, 466 U.S. at 687). We review ineffective assistance of counsel claims de novo. *United States v. Anderson*, 55 M.J. 198, 201 (C.A.A.F. 2001); *United States v. Wiley*, 47 M.J. 158, 159 (C.A.A.F. 1997).

As set forth above, we find the facts and circumstances surrounding the appellant's use of cocaine, to include passing the CD case with cocaine on it to A1C RM

[2] U.S. CONST. amend. VI.

and holding the steering wheel while he used the cocaine, to be proper matters in aggravation. Accordingly, there was no valid basis to object to such questioning of A1C RM or the argument of trial counsel, and no deficient performance by trial defense counsel. Lacking this first prong of the *Strickland* test, we find no ineffective assistance of counsel.

Furthermore, having found no error with respect to trial counsel's argument for a bad-conduct discharge, there was again no valid basis for an objection. Finding no deficient performance in this area, the appellant has failed to meet her burden of demonstrating ineffective assistance of counsel.

Sentence Severity

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 384-85 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of the offenses, the appellant's record of service, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercise of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

This Court has carefully examined the submissions of counsel, the entire record of trial, the character of the appellant, appellant's military record, the nature and seriousness of the offense, and taken into account all the facts and circumstances surrounding the offense of which she was found guilty. We do not find that the appellant's sentence, one which includes a punitive discharge, is inappropriately severe.

Conclusion

The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court