UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JONATHAN A. MARTIN
United States Air Force

ACM S31935

25 January 2013

Sentence adjudged 13 April 2011 by SPCM convened at Travis Air Force Base, California. Military Judge: Scott E. Harding.

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

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Lance R. Smith; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HECKER, Judge:

At a special court-martial composed of officer members, the appellant pled guilty to wrongful use of ecstasy on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. After the military judge accepted his pleas and entered findings of guilty, the court sentenced him to a bad-conduct discharge and reduction to the grade of E-1. The convening authority approved the sentence as adjudged, and also approved the appellant for placement in the Air Force Return to Duty program. After the appellant successfully completed that program, the Air Force Clemency and Parole Board (AFCPB) returned the appellant to duty on 16 November 2011 and directed suspension of the bad-conduct discharge for one year. When the appellant successfully served on active

duty for a year, his bad-conduct discharge was remitted by the AFCPB, effective 16 November 2012.[1]

On appeal, the appellant asserts his sentence must be set aside because the trial counsel made an improper argument and the military judge failed to issue a curative instruction. Finding no error that materially prejudices the appellant, we affirm.[2]

Trial Counsel Argument

The appellant pled guilty to using ecstasy on four occasions in 2010. Each time, he was at a concert with other Airmen and they all used the illegal substance after purchasing it from a civilian.

During the sentencing phase, the military judge gave the members the standard instructions regarding their ability to impose a bad-conduct discharge, including that such a discharge is a severe punishment and has a stigma recognized by our society. The members were also instructed that a punitive discharge would deny the appellant "advantages which are enjoyed by one whose discharge characterization indicates he has served honorably."

During sentencing argument, the trial counsel stated:

> [A] bad conduct discharge is appropriate. Make no mistake about it: it is serious punishment for serious criminal misconduct, and using ecstasy on four separate times during the course of six months is serious criminal misconduct. It deserves a bad conduct discharge.
>
> . . . .
>
> For these actions, he deserves a bad conduct discharge. . . . *By not adjudging a bad conduct discharge we're saying that his service can still be characterized as honorable.* Honorable recognition of service is a prestigious reward for honorable service. Members, a bad conduct

[1] The actions of the Air Force Clemency and Parole Board are reflected on a Special Court-Martial Order, dated 12 December 2011, and a memorandum, dated 17 November 2011. We order the inclusion of these documents in the official record of trial.

[2] We retain jurisdiction under Article 66(b), UCMJ, 10 U.S.C. § 866(b), by virtue of the approved sentence, which includes a bad-conduct discharge. *United States v. Johnson*, 45 M.J. 88, 90 (C.A.A.F. 1996); *United States v. Boudreaux*, 35 M.J. 291, 293 (C.M.A. 1992). The bad-conduct discharge remains part of the sentence approved by the convening authority. Remission of part of an approved sentence does not affect appellate court jurisdiction. *United States v. Pfleuger*, 65 M.J. 127, 129 (C.A.A.F. 2007) (citing *Steele v. Van Riper*, 50 M.J. 89, 92 (C.A.A.F. 1999)). However, because the bad-conduct discharge has been remitted, it cannot be executed under Article 71, UCMJ, 10 U.S.C. § 871. *Id.* at 131.

> discharge properly punishes him for what he has done and it properly characterizes his service.

(Emphasis added.).

The trial defense counsel did not object during the trial counsel's argument. During his own sentencing argument, he stated:

> The decision of choosing not to give a bad conduct discharge does not mean that you are characterizing his service as honorable; that's not accurate. Your decision today is really to consider whether he should receive a bad conduct discharge and that alone; you're not putting an ultimate characterization on his time in service. What you need to look at is whether that specific tool – which is the most severe punishment you can give – is appropriate in this case. I'll tell you that the crimes presented to you today do not warrant a bad conduct discharge. Let's talk about the crimes that he committed.

The appellant now contends plain error occurred when the trial counsel blurred the distinction between an administrative and punitive discharge and the military judge failed to provide an instruction. We disagree.

Improper argument is a question of law that we review de novo. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011). Failure to object to improper argument before the start of sentencing instructions waives the objection. Rule for Courts-Martial 1001(g). Absent objection, argument is reviewed for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). To prevail, the appellant must prove that: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Id*. (citation and internal quotation marks omitted). Comments in sentencing argument are not viewed in isolation, but in context: "[T]he argument by a trial counsel 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)). An error is not "plain and obvious" if, in the context of the entire trial, the appellant fails to show that the military judge should have intervened sua sponte. *United States v. Burton*, 67 M.J. 150, 153 (C.A.A.F. 2009). "[T]he lack of a defense objection is some measure of the minimal impact of [the trial counsel's] improper argument." *United States v. Gilley*, 56 M.J. 113, 123 (C.A.A.F 2001) (citation and internal quotation marks omitted).

The appellant contends the trial counsel told the members the appellant will receive an honorable discharge if they fail to adjudge a bad-conduct discharge. We do not believe the argument went that far. Although the trial counsel's comment was

inartful, it is technically not an incorrect statement. If the appellant did not receive a punitive discharge from his court-martial, his service "can still be characterized" someday as "honorable," depending on future events.[3]

However, the possibility of an accused receiving an administrative discharge in the event a punitive discharge is not adjudged is a collateral matter that should not be of concern to the court-martial. *See United States v. Tschip*, 58 M.J. 275, 277 (C.A.A.F. 2003); *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997). Thus, to the extent a trial counsel's sentencing argument raises or blurs the distinction between a punitive discharge and administrative separation from the service, it would be improper. *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989) (A sentencing proceeding is "not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated.").

After examining the argument in the context of the entire court-martial, even if we assume the trial counsel's statement was plain and obvious error, we find no material prejudice to the substantial rights of the appellant. Interpreting the trial counsel's remarks in context, we find the argument properly commented on the appropriateness of a bad-conduct discharge as punishment and did not suggest that a punitive discharge be used simply to separate the appellant from the Air Force. *See United States v. Greska*, 65 M.J. 835, 838 (A.F. Ct. Crim. App. 2007). His argument was in line with the military judge's instructions that a punitive discharge would appropriately deprive the appellant of the benefits reserved for those who have served honorably. Additionally, a prosecutor may argue during sentencing that a bad-conduct discharge is a proper way to characterize an accused's service or enlistment. *United States v. Britt*, 48 M.J. 233, 234 (C.A.A.F. 1998). Viewed in the context of the entire trial, we find the trial counsel's argument did not materially prejudice the substantial rights of the appellant.

Conclusion

The findings and sentence, as approved by the convening authority, are correct in law and fact. Article 66 (c), UCMJ, 10 U.S.C. § 866(c). We find no error materially prejudicial to a substantial right of the appellant occurred.[4] Article 59(a), UCMJ,

---

[3] *See* Air Force Instruction 36-2308, *Administrative Separation of Airmen*, ¶ 1.21.3 (9 July 2004) (without Secretary of the Air Force approval, an Airman cannot be discharged under other than honorable conditions if the sole basis for discharge is a serious offense that resulted in conviction by a court-martial that did not adjudge a punitive discharge).

[4] We note that the overall delay of more than 540 days between the time of docketing and review by this Court is facially unreasonable. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Having considered the totality of the circumstances and the entire record, we find that the appellate delay in this case was harmless beyond a reasonable doubt, and relief is not otherwise warranted. *Id.* at 135-36 (reviewing claims of post-trial and appellate delay using the four-factor analysis found in *Barker v. Wingo*, 407 U.S. 514, 530 (1972)); *United States v. Harvey*, 64 M.J. 13, 24 (C.A.A.F. 2006); *United States v. Tardif*, 57 M.J. 219, 225 (C.A.A.F. 2002).

10 U.S.C. § 859(a). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court