UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JOHN C. MELCHER
United States Air Force

ACM S31891

7 March 2013

Sentence adjudged 18 November 2010 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Michael J. Coco.

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $964.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Andrew J. Unsicker and Captain Shane A. McCammon.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Captain Erika L. Sleger; 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 cocaine on divers occasions and a one-time distribution of cocaine, 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 the appellant to a bad-conduct discharge, confinement for 2 months, forfeitures of $964 pay per month for 2 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged. On appeal, pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982),

the appellant asserts his sentence should be set aside because the military judge admitted evidence of uncharged misconduct and trial counsel argued its use for an improper purpose. Finding no error that materially prejudices the appellant, we affirm.

Sentencing Evidence and Argument

On two occasions between late April 2010 and late May 2010, the appellant asked an exotic dancer at Texas Showgirls if she could procure some cocaine for him. The first time, he gave her $20 and she returned a few minutes later with the cocaine, which he promptly snorted in the bathroom. A month later, he procured $100 worth of cocaine from her and snorted it with Airman First Class (A1C) CL while the two were parked in a car outside the Stage West nightclub. For these two incidents, he pled guilty to divers uses of cocaine. He also pled guilty to distribution of cocaine for handing it to the other Airman while in the car.

In sentencing, the Government planned to call former-A1C AC, who had separated from the military by the time of trial and was inexplicably going by the name of ADB, to testify about some of his interactions with the appellant involving illegal drugs. During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, Mr. ADB testified that, sometime in May 2010, while he was playing pool at the Stage West nightclub with the appellant and two other Airmen, the appellant told them he could get them some cocaine if they gave him money. Trial defense counsel objected on the grounds that this constituted uncharged misconduct, of which the defense had not been given notice, and was not proper aggravation evidence. The Government responded, "[T]his goes towards the aggravation. Airman Melcher has admitted to use at Texas Showgirls. This just shows the factors that led up to that use, that he was with a bunch of [A]irmen, that he was talking about cocaine beforehand, that this wasn't just something that he was at Texas Showgirls on his own and had a spur-of-the-moment decision that, 'I'm going to go and use cocaine and find some.'"

Due to some confusion about the underlying facts, the military judge directed the trial counsel to continue eliciting testimony from Mr. ADB so he could assess its admissibility. According to Mr. ADB, after the appellant made the comment about being able to procure cocaine, the men went to the Texas Showgirls nightclub, where the appellant pointed out a man who had previously sold him cocaine. After a few minutes, the appellant left the table and, when he returned, the men went to the parking lot. While Mr. ADB smoked Spice in the front seat, he saw the appellant taking white powder out of a small bag and putting it in lines on a compact disc case. Mr. ADB heard a sniffing sound, and it appeared to him that the appellant had snorted it, as he was sniffling a lot and acted nervous.

It appears that, at this point, the military judge and trial defense counsel believed this specific testimony related to one of the uses the appellant had already pled guilty to. The trial defense counsel's objection focused on the testimony not being proper

aggravation evidence under Rule for Courts-Martial (R.C.M.) 1001(b)(4) and being "cumulative" to the information the appellant provided in his guilty plea inquiry. The military judge noted, "It certainly explains the offense, somebody who actually saw it occurring." Finding that replaying the guilty plea inquiry for the members "does not preclude the Trial Counsel from putting on the facts and circumstances surrounding the actual offense," the military judge found Mr. ADB's testimony about the appellant's drug use to be "directly related to the offense." He stated, "I believe that they can put on evidence of somebody who saw the crime being committed, to show what actually happened at the time." In contrast, the military judge found the appellant's comments about being able to get cocaine for the other Airmen to be uncharged misconduct and inadmissible.

When the trial counsel then stated A1C CL was not one of the men present when the appellant used cocaine in the car with Mr. ADB, the military judge appeared to recognize that Mr. ADB was actually going to be testifying about the appellant's use of cocaine on a third occasion. He stated "the [G]overnment is certainly not forced to take the accused's versions of events [from the guilty plea inquiry]. *They can put on the evidence that he's charged with divers use of cocaine. If they have another use that they want to put on evidence of, they certainly can do so.*" (Emphasis added.). The military judge did not state on the record whether he had conducted a balancing test under Mil. R. Evid. 403 before making his decision, nor did he say whether he was considering this particular use to be a matter in aggravation or a use covered by the specification itself which alleges "divers" uses.

In front of the members, Mr. ADB testified consistently with the military judge's ruling. He stated the appellant pointed out a man who dealt cocaine and then left their table. The men later accompanied the appellant to a car, where he spread the cocaine on a compact disc case and snorted it. In an apparent effort to determine whether this testimony was describing one of the uses the appellant pled guilty to, a panel member asked Mr. ADB whether A1C CL was present during this incident. Mr. ADB responded that none of the Airmen were named CL but he did not know if any of the Airmen ever used that name. In cross examination, the trial defense counsel elicited that, at the time of this incident, Mr. ADB was smoking Spice and providing it to some of the other Airmen in the car, was never disciplined for that misconduct and separated with an honorable discharge.

After Mr. ADB testified, the defense did not request a limiting instruction regarding the panel's use of this evidence in its deliberations on sentence. The military judge gave the standard instruction:

> It is the duty of each member to vote for a proper sentence for the offense of which the accused has been found guilty. . . . Although you must give due consideration to all matters in mitigation and extenuation as well as

> those in aggravation *you must bear in mind that the accused is to be sentenced only for the offense of which he has been found guilty*.
>
> . . . .
>
> In determining the sentence, you should consider all the facts and circumstances of the offense of which the accused has been convicted and all matters concerning the accused. Thus, you should consider the accused's background, his character, his service record, all matters in extenuation and mitigation, and any other evidence he presented. You should also consider any matters in aggravation.

(Emphasis added.).

Without objection from the defense, the trial counsel's sentencing argument included the following:

> He's been convicted of using cocaine on more than one occasion, and he's been convicted of distribution of cocaine. Your job is to determine an appropriate sentence, and your job is to look at his own actions and what he has earned.
>
> . . . [T]he maximum amount of time you could confine [him] is 12 months. . . . Four months is reasonable. Why is four months reasonable? You've heard evidence today of *three separate uses of cocaine* by Airman Mechler.
>
> . . . *That's three uses. One month confinement for each use*, and one month confinement for the one time he distributed that cocaine to Airman [CL], four months' confinement.
>
> . . . [H]is actions have also earned him a bad conduct discharge. . . . [A] bad conduct discharge is a type of punishment given to an individual who doesn't necessarily engage in conduct that involves serious offenses, but engages in bad conduct. And that's exactly what Airman Melcher has done here.
>
> Here's an individual who was in the military for six months . . . He decides to ask an individual randomly on his own if she has any cocaine . . . and he used it, and he used it again, *and he used it a third time*. And on that occasion, he passed that over to his [A]irman, his buddy for the evening. It's not bad conduct?

> He used cocaine on the occasion in the car. *You heard Mr. [AB] get on the stand and talk about that time.* He used it with Air Force members around.

(Emphasis added.).

Discussion

The appellant asserts it was error for the military judge to admit, over his objection, evidence about his additional use of cocaine and for the trial counsel to argue he should be punished for that use. He argues it constituted "uncharged misconduct" that did not constitute appropriate aggravation evidence under R.C.M. 1001(b)(4), as it was not "directly related" to the charged crime. The Government responds that the evidence is properly admissible as aggravation evidence.

We review a military judge's decision to admit sentencing evidence, including aggravation evidence under R.C.M. 1001(b)(4), for abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009) (citation omitted). Improper argument is a question of law that we review de novo and, in the absence of a defense objection, we review for plain error. R.C.M. 1005(f); *United States v. Burton*, 67 M.J. 150, 152 (C.A.A.F. 2009) (citation omitted).

Mr. ADB's testimony described a cocaine use by the appellant that occurred within the time frame contained in the specification to which the appellant pled guilty. It is unclear whether the military judge admitted evidence of this third drug use as aggravation evidence or as evidence of the charged offense itself (namely to prove the appellant's "divers" use of drugs involved three uses, not the two the appellant discussed during his guilty plea inquiry). The trial counsel did expressly ask the panel to punish the appellant for that third use of cocaine, as if he was indeed guilty beyond a reasonable doubt of using cocaine on three occasions.

Because this use of cocaine was neither validated by a guilty plea inquiry nor proven to a fact-finder beyond a reasonable doubt during litigation on findings, the appellant's conviction for "divers" uses of cocaine does not cover this third use, and Mr. ADB's testimony should not have been admitted for that purpose. Evidence of the use, however, would be admissible as aggravation evidence, under the "continuing offense doctrine," whereby evidence of similar misconduct that is part of a continuous course of conduct involving similar crimes has been deemed within the ambit of R.C.M. 1004(b)(1).[1]

[1] *See United States v. Moore*, 68 M.J. 491 (C.A.A.F. 2010) (mem.) (It was not plain error to admit evidence of two failed urinalysis tests taken several months outside the charged time period "in light of the continuing offense doctrine and a lack of material prejudice" in a judge alone trial); *United States v. Nourse*, 55 M.J. 229, 231-32 (C.A.A.F. 2001) (Evidence of additional thefts from a sheriff's office was admissible in a larceny case because it was part of the accused's continuing scheme to steal and was admissible to show the full impact on the victim);

Such matters in aggravation, when admitted at trial, must be used for an appropriate purpose, namely to inform the sentencing authority's judgment regarding the charged offense and putting that offense in context. *United States v. Mullens*, 29 M.J. 398, 400 (C.M.A. 1990); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982); *United States v. Nourse*, 55 M.J. 229, 232 (C.A.A.F. 2001). Here, the trial counsel asked the panel to sentence the appellant to one month of confinement for each of his uses of cocaine, to include the third use, as if the appellant had been found guilty beyond a reasonable doubt of that third use. Under the facts of this case, we find that argument to be error, which went uncorrected by the military judge.

That does not end our inquiry, however, as we must evaluate whether this error prejudiced the appellant. We balance the severity of the improper argument, any measures by the military judge to cure it, and the weight of the evidence supporting the sentence to determine whether the trial counsel's comment, taken as a whole, was so damaging that we cannot be confident that the appellant was sentenced on the basis of his convictions alone. *United States v. Marsh*, 70 M.J. 101, 107 (C.A.A.F. 2011) (citation and quotation marks omitted).

In looking at the weight of the evidence supporting the sentence, we consider whether it is evident that the appellant "so clearly deserved" to receive the adjudged sentence for two uses of cocaine that the trial counsel's argument about the third use was irrelevant to the members' decision. *United States v. Hardison*, 64 M.J. 279, 284 (C.A.A.F. 2007). We evaluate this by taking into considering the record as a whole, including the relative weight of the parties' respective sentencing cases. *Marsh*, 70 M.J. at 107. We also note that the lack of 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).

The evidence supporting the adjudged sentence is strong. At the time of his court-martial, the appellant had been on active duty for only one year. Within six months of joining the Air Force, he sought cocaine from a local exotic dancer and snorted it in a public restroom. A month later, he bought a larger amount and shared it with another Airman in a public parking lot. Meanwhile, he was receiving two letters of counseling and one letter of reprimand for violating training rules and lying to a non-commissioned officer. Considering the record as a whole, including the sentencing cases presented by both sides, the appellant's two uses of cocaine and his distribution of cocaine, his military record and the evidence properly admitted at trial, he "clearly deserved" the adjudged sentence, which included only half the confinement requested by the trial counsel. We

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United States v. Shupe, 36 M.J. 431, 436 (C.M.A. 1993) (Evidence of drug transactions outside the pled-to conspiracy was admissible to show the charged misconduct was not an "isolated transaction" and "the continuous nature of the charged conduct and its full impact on the military community"); *United States v. Ross*, 34 M.J. 183, 187 (C.M.A. 1992) (It was permissible to show the accused had altered 20-30 enlistment aptitude tests, even though he pled guilty to altering only four, as it shows his "pattern" of conduct and the harm suffered by the Army).

are confident the appellant was sentenced on the basis of the properly admitted evidence and clearly deserved the sentence he received.[2] *United States v. Erickson*, 65 M.J. 221, 224 (C.A.A.F. 2007). We also find this sentence would have been imposed at the trial level even if the sentencing argument error had not occurred. *United States v. Sales*, 22 M.J. 305, 307 (C.M.A. 1986).

Furthermore, we have given individualized consideration to this particular appellant, the nature and seriousness of the offenses of which he was convicted, the appellant's record of service, and all other matters properly before the panel in the sentencing phase of the court-martial. *See 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). We find that the adjudged and approved sentence was appropriate in this case and was not inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact,[3] and no error prejudicial to the substantial rights of the appellant occurred.[4] Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c). Accordingly, the findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[2] The trial defense counsel's effective cross-examination of Mr. ADB likely caused some panel members to doubt the veracity of his testimony and his ability to observe the appellant on the night in question.

[3] We note an administrative error with the record of trial. Prosecution Exhibit 6 is erroneously included within the "prosecution exhibits admitted into evidence" section of the record of trial, when it actually was never admitted into evidence. We direct that the record of trial be corrected. The members did not receive this exhibit during the court-martial, so no prejudice to the appellant occurred.

[4] 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. *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)). *See also 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).