UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman KIMBERLY D. OGDEN
United States Air Force

ACM S30316

15 June 2005

Sentence adjudged 21 January 2003 by SPCM convened at Scott Air Force Base, Illinois. Military Judge: Ann D. Shane (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Michelle M. Lindo.

Before

ORR, GRANT, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

The appellant was tried by a special court-martial composed of a military judge sitting alone. Pursuant to her plea, the military judge found her guilty of wrongful use of methylenedioxymethamphetamine (MDMA), also known as "ecstasy," in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 5 months, and reduction to the grade of E-1. The convening authority approved the sentence as adjudged.

The appellant now asserts that the military judge erred when she permitted the trial counsel to argue, over defense objection, that a bad-conduct discharge was warranted because the appellant "had not served honorably." We have examined the record of trial, the assignment of error, and the government's response thereto. For the reasons set out below, we find no error and affirm.

Background

The appellant pleaded guilty to one specification of wrongful use of a controlled substance. She testified during the providence inquiry that when she was out at a bar, someone she knew to be a drug user had crushed a tablet in his hand and placed the substance into her drink, which they both then shared. The appellant stated that, while she did not know the substance was ecstasy, she was confident it was contraband based on the following: (1) She knew this individual used drugs; (2) She had seen him use drugs in the past; and (3) He shared the drink with her after he added the substance. The appellant was selected for random urinalysis testing, and the result was positive for ecstasy. The appellant's plea was accepted and she was convicted of wrongfully using ecstasy.

During the sentencing phase of the trial, the government presented the personal data and character of the appellant's service, as provided for under Rule for Courts-Martial 1001(b)(2). These matters included two instances of nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, and one letter of reprimand. The appellant received nonjudicial punishment for assaulting her husband with a knife and using her government travel credit card for unauthorized purchases. The letter of reprimand was for the appellant having left the scene of an automobile accident. Trial defense counsel introduced a variety of letters in support of the appellant, a letter of appreciation, and certificates and awards she had received during her 23-month period of service. The appellant requested to be punitively discharged from the Air Force. The military judge conducted the appropriate inquiry in accordance with *United States v. McNally*, 16 M.J. 32 (C.M.A. 1983).

In argument on sentencing, trial counsel argued, "The accused did not serve as an honorable military member 24 hours a day, seven days a week. A bad conduct discharge is appropriate in this case because the accused has not served honorably. A punitive discharge is reserved for those members who do not serve honorably." Defense counsel made a timely objection. The military judge's ruling, in toto, was as follows:

> Well, on that, I will specifically overrule that. The instruction does say that the bad conduct discharge indicates a discharge for one who has not served honorably, is reserved for one who's service has not been an honorable service. I realize, obviously, that it's not a discharge characterization. I realize it is punitive as I've discussed with [the appellant], so there's no

> chance that I'm going to consider it simply as a discharge characterization as opposed to a punitive separation, but I do believe, counsel, in context, her argument would be proper, so I'm going to overrule.

Thereafter, the trial counsel later argued that "the accused has not done her job well. She has not served honorably. She has made a series of choices that have landed her here today."

The appellant argues that this Court should set aside her sentence and order a rehearing on sentence or provide meaningful relief from her approved sentence.

Discussion

We review de novo claims of improper argument by trial counsel. *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). The legal test for determining the propriety of counsel's argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the appellant. *Id.* at 237. The focus of the inquiry is on the argument as a whole. *Id.* at 238. For the reasons set out below, we find that appellant's material rights were not substantially prejudiced and affirm the findings and sentence.

Punitive discharges characterize the appellant's service. *United States v. Britt*, 48 M.J. 233, 234 (C.A.A.F. 1998). Relying on *Britt*, this Court has permitted trial counsel to argue during sentencing that a punitive discharge is a way to characterize the accused's service. *United States v. Brown*, ACM 34336 (A.F. Ct. Crim. App. 2 Oct 2001) (unpub. op.). What trial counsel may not do, however, is argue the punitive discharge as merely a means to exit the appellant from the service or imply that it is a simple label of service without acknowledging the punitive nature of the discharge. *Id.* In this case, the argument, as a whole, was not improper, but rather fair comment on the evidence before the trial court and the inferences to be drawn therefrom. Accordingly, considered as a whole, we do not find error in this argument.

Even if we were to find that trial counsel's comments were improper, we do not find that they materially prejudiced the appellant's substantive rights. The argument was before the military judge rather than court members. We are convinced that the military judge was not confused or misled by the argument. In overruling trial defense counsel's objection to the argument, the military judge said, "I realize it is punitive as I've discussed with [the appellant] so there's no chance that I'm going to consider it simply as a discharge characterization as opposed to a punitive separation." The referenced inquiry with her was undertaken to ensure the appellant understood the ramifications of the punitive discharge she was requesting. Further, the military judge advised the appellant that the court would be imposing what it believed to be an appropriate sentence based on the record before the court, which included the testimony presented during sentencing,

the documents admitted, the appellant's statement and request for a punitive discharge, and the arguments of counsel.

Conclusion

We conclude 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court