UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

No. ACM S32359

UNITED STATES
Appellee

v.

Avery V. SMALLEY
Airman First Class (E-3), U.S. Air Force, *Appellant*

Appeal from the United States Air Force Trial Judiciary

Decided 2 March 2017

Military Judge: Joseph S. Imburgia.

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1. Sentence adjudged 26 August 2015 by SpCM convened at Nellis Air Force Base, Nevada.

For Appellant: Captain Patricia Encarnación Miranda, USAF.

For Appellee: Captain Sean J. Sullivan, USAF, and Gerald R. Bruce, Esquire.

Before MAYBERRY, SPERANZA, and JOHNSON, *Appellate Military Judges*.

Senior Judge MAYBERRY delivered the opinion of the Court, in which Judges SPERANZA AND JOHNSON joined.

MAYBERRY, Senior Judge:

A special court-martial composed of officer members found Appellant guilty in accordance with his pleas of one specification of divers wrongful use of lysergic acid diethylamide, one specification of divers wrongful use of psilo-

cybin, one specification of divers wrongful use of oxycodone, one specification of divers wrongful use of marijuana, and one specification of divers wrongful use of Tylenol with codeine, all in violation of Article 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 912a. The court-martial sentenced Appellant to a bad-conduct discharge, confinement for two months, forfeiture of $515.00 per month for 12 months, and reduction to E-1. The convening authority disapproved the forfeitures but approved the remainder of the sentence as adjudged.[1]

Appellant asserts the military judge abused his discretion by excluding mitigation evidence admissible under Rule for Courts-Martial (R.C.M.) 1001(c)(1)(B). We find no prejudicial error and affirm.

I. BACKGROUND

After pleading guilty, Appellant offered evidence at sentencing consisting of character statements, personal photos, numerous military awards, certificates and coins, as well as testimony from his mother and his unsworn statements (both oral and written). The Defense presented no evidence regarding rehabilitative potential in the Air Force. At the conclusion of the presentation of evidence, a court member inquired as to whether the members would be allowed to ask questions. Initially, the military judge informed the members that they could have questioned Appellant's mother and so at that point in time there would not be an opportunity to ask questions of anyone. The next morning, however, the military judge clarified that under Article 46, UCMJ, 10 U.S.C. § 846, court members could request witnesses that they believed would be relevant. Eventually, the military judge called Appellant's first line supervisor to testify. At the conclusion of her testimony, trial defense counsel asked her if she had an opinion as to Appellant's rehabilitative potential. Trial counsel objected to the question as outside the scope of direct examination, and the military judge sustained the objection.

II. DISCUSSION – ADMISSIBILITY OF SENTENCING EVIDENCE

A military judge's decision to admit or exclude evidence at sentencing is reviewed for an abuse of discretion. *United States v. Carter*, 74 M.J. 204, 206 (C.A.A.F. 2015); *United States v. Stephens,* 67 M.J. 233, 235 (C.A.A.F. 2009).

R.C.M. 1001(c)(1)(B) permits defense counsel to offer evidence at sentencing in mitigation of the offense charged. Military Rule of Evidence (Mil. R.

[1] The pretrial agreement capped confinement at four months.

Evid.) 614(a) authorizes the military judge to call witnesses at the request of the members, and all parties are entitled to cross-examine witnesses thus called. Cross-examination should be limited to the subject matter of the direct examination but the military judge may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination. Mil. R. Evid. 611(b).

Mitigation evidence may include testimony from witnesses about the accused's rehabilitative potential. *United States v. Griggs*, 61 M.J. 402, 409 (C.A.A.F. 2005). Any error in the admission or exclusion of testimony or other evidence at sentencing should only be remedied if it caused prejudice to the accused or substantially influenced the adjudged sentence. *Id*. at 410.

A. Staff Sergeant SW's Testimony

Appellant provided documentary and testimonial evidence in mitigation. Trial defense counsel made the tactical decision as to what evidence to offer and this evidence did not include any reference to Appellant's rehabilitative potential in the Air Force. It is true that a number of the character statements offered by family and friends offered the opinion that Appellant had outstanding rehabilitative potential, but none of them were from military personnel.

After the sentencing evidence was presented but prior to argument by counsel, a court member, Major (Maj) K, inquired of the military judge as to whether or not they would be afforded the opportunity to submit questions regarding the case that were not addressed in either Appellant's or his mother's testimony. Maj K indicated that the information she was seeking dealt with whether Appellant had gone through drug rehabilitation, was being seen by mental health, and what, if anything, had been done after the incidents directed toward correcting his behavior. No particular witness was identified by the members.

Ultimately, the military judge called Appellant's first line supervisor, SSgt SW, who testified about Appellant's drug treatment, including Appellant's successful completion of the initial phase of the Alcohol and Drug Abuse Prevention and Treatment (ADAPT) Program. Both the prosecution and trial defense counsel also questioned the witness. Other court members subsequently submitted questions concerning the impact of Appellant's conduct on the mission. SSgt SW testified that Appellant was the Drug Demand Reduction Program Monitor (DDRPM), but he had not used his position to help prevent himself or another member from getting caught using drugs. SSgt SW also testified that Appellant's last known drug use was 6 March 2015, which mirrored the date stated in the Stipulation of Fact. After this testimony, the military judge allowed further questioning of SSgt SW by

counsel on these matters, including cross-examination. After the completion of this line of questioning, Appellant's counsel for the first time asked SSgt SW for her opinion on Appellant's rehabilitative potential—a topic never posed by the court members. The Government objected to this line of Defense inquiry as beyond the scope and the military judge sustained the objection, noting that the Defense previously "had the opportunity to call" SSgt SW but "chose not to."

B. Appellant's Sentencing Evidence

Appellant's written unsworn statement as well as a number of Defense character letters included the fact that he had successfully completed ADAPT. At the time of Maj K's request to have additional information about Appellant's drug treatment or corrective behavior, that evidence had been published to the members but had not yet been reviewed. Trial defense counsel did not verbalize this to either the military judge or the member at the time of Maj K's question. Appellant's oral unsworn statement consisted primarily of an apology, and a declaration that he would not allow drugs to influence him in the future as well as his stated ambition to be a better person.

Appellant's written unsworn statement included an attachment of the various Department of Veterans Affairs benefits that were impacted by the characterization of any discharge he might receive, both punitive and non-punitive. While it is apparent that the Defense strategy was built around the hope of avoiding a punitive discharge, the evidence presented in support of that strategy was minimal.

After trial counsel objected to the attempt to elicit SSgt SW's opinion as to rehabilitative potential, trial defense counsel asserted that her testimony laid the foundation to provide opinion evidence as to his rehabilitative potential and defense counsel was "entitled" to cross-examine her. We disagree with counsel that the testimony laid the foundation for rehabilitative potential testimony but completely agree that Appellant was entitled to, and in fact did, cross-examine SSgt SW. The issue before us is whether the military judge erred in sustaining the objection because the question was outside the scope of direct examination, and if so, whether Appellant was prejudiced.

C. Mitigation Evidence

Appellant presented mitigation evidence and rested his sentencing case. The request by Maj K for additional information was unusual, but in large part the result of the fact that the published evidence had not yet been reviewed by the court members. SSgt SW's testimony was cumulative in two respects, specifically with regard to Appellant's completion of ADAPT and the fact that his last acknowledged drug use was *after* he provided his random urinalysis. SSgt SW's testimony that Appellant did not abuse his DDRPM

position can be characterized as mitigation, but it did not remotely address rehabilitative potential.

Defense counsel argued for eight months' confinement, asking the members to spare Appellant a bad-conduct discharge. In light of the significant drug use by Appellant, involving five different controlled substances over an extended period of time, defense counsel had a difficult task. Nevertheless, counsel had chosen a strategy, built Appellant's case around that strategy, and offered evidence in support of that strategy.

There is no evidence in the record that SSgt SW had an opinion as to Appellant's rehabilitative potential in the Air Force, or if she did, whether it would have been favorable. She was sitting in the courtroom at the time Maj K requested additional information and defense counsel knew, as Appellant's supervisor, she had knowledge of his ADAPT appointments. She had never been identified as a witness by the Defense and the absence of evidence on the record supports that she had never been considered as a witness for the Defense.

While we need not determine whether the military judge erred in allowing SSgt SW to testify, the record before us already contained most of the information she testified to. The military judge did not err in sustaining the objection to Appellant's question being outside the scope of direct. Appellant, through his counsel, had the opportunity to provide evidence in mitigation and did so. The military judge did not restrict the Defense from offering mitigation evidence; he simply declined to allow the Defense to stray into unknown territory regarding this witness's opinion as to Appellant's rehabilitative potential, whatever it may have been. Accordingly, Appellant was not prejudiced.

III. CONCLUSION

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

FOR THE COURT

KURT J. BRUBAKER
Clerk of the Court