

UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant CHRISTOPHER M. URICH
United States Air Force

ACM 36823

20 October 2008

Sentence adjudged 23 June 2006 by GCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: James B. Roan.

Approved sentence: Dishonorable discharge, confinement for 2 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Sandra K. Meadows, Lieutenant Colonel Mark R. Strickland, Captain Vicki A. Belleau, and Captain Timothy M. Cox.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel John P. Taitt, and Major Matthew S. Ward.

Before

WISE, BRAND, and HELGET
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

BRAND, Senior Judge:

Consistent with his pleas, the appellant was convicted of wrongful divers uses of cocaine and methamphetamine, wrongful divers distributions of marijuana and cocaine, wrongful distribution of methamphetamine, and wrongful introduction of methamphetamine and cocaine onto a military installation, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The approved sentence consists of a dishonorable discharge, confinement for 2 years, total forfeitures, and reduction to E-1.

There are five issues on appeal. They are whether: 1) the military judge erred to the substantial prejudice of the appellant when he denied the appellant's pretrial motion in limine to exclude evidence of irrelevant, indirect, and uncharged misconduct, the prejudice of which far outweighed its probative value; 2) the military judge erred when he failed to give a limiting instruction as to the uncharged misconduct testimony allowed at trial; 3) the military judge erred when he failed to give a limiting instruction as to the trial counsel's improper argument; 4) the military judge improperly denied the appellant's request for three-for-one administrative credit on his sentence to confinement because the government improperly withheld the appellant's pay; and 5) the appellant's sentence is inappropriately severe. Finding no merit in any of the appellant's issues, we affirm.

Background

The appellant was addicted to cocaine. As he explained to the military judge, "Once I started [using cocaine], I just couldn't stop." The appellant also used methamphetamine on several occasions. Periodically,¹ the appellant and Airman Basic (AB) BF would use cocaine together. In December 2005, AB BF had a urinalysis, which tested positive for cocaine. As a result, AB BF worked as a confidential source for the Air Force Office of Special Investigations (AFOSI).

On 9 January 2006, AB BF, as a confidential source, asked the appellant to provide him with some cocaine. The appellant told AB BF that he didn't have any cocaine but provided AB BF with marijuana instead. About 10 to 15 minutes later, the appellant provided another individual, called 'Louie,' with marijuana. AB BF testified that during that evening, the appellant opened his kitchen stove and showed AB BF 10 one-pound bags of marijuana. Later, the appellant followed AB BF out to AB BF's car and talked about going to Rio Rico and picking up drugs.

On 17 January 2006, AB BF again approached the appellant for cocaine. This time, the appellant met AB BF on base and provided AB BF with a baggie of cocaine and a baggie of methamphetamine.

On 20 January 2006, the appellant was interviewed by the AFOSI and consented to a search of his house, vehicle, and urine. Various items of drug paraphernalia were seized and the urinalysis tested positive for cocaine and methamphetamine.

Discussion

Admission of Evidence

¹ According to Airman Basic BF, they used cocaine together six to eight times.

The defense counsel made a motion in limine to prevent the introduction of certain evidence, including drug paraphernalia and testimony about the appellant allegedly transporting marijuana. The military judge found the evidence was relevant as facts and circumstances surrounding the offenses and as a continuing course of conduct. Additionally, the military judge applied the balancing test required under Mil. R. Evid. 403.²

We review a military judge's decision to admit or exclude evidence under an abuse of discretion standard. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006) (quoting *United States v. McDonald*, 59 M.J. 426, 430 (C.A.A.F. 2004)). “[A] military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.” *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)).

Uncharged misconduct is admissible to show the continuous nature of the offenses and the impact on the military community. *United States v. Turner*, 62 M.J. 504, 506 (A.F. Ct. Crim. App. 2005). Such conduct is admissible if it is directly related to or resulted from the offenses. *Id.*; Rule for Courts-Martial (R.C.M.) 1001(b)(4). If the military judge conducts a proper balancing test,³ the ruling is not overturned unless there is a “clear abuse of discretion.” *Turner*, 62 M.J. at 506 (citing *United States v. Ruppel*, 49 M.J. 247, 250 (C.A.A.F. 1992)). The military judge did not abuse his discretion when he admitted evidence of uncharged misconduct.

Limiting Instruction as to Uncharged Misconduct

During several Article 39a, UCMJ, 10 U.S.C. § 839a, sessions with counsel, the military judge discussed giving a limiting instruction on the uncharged misconduct. During the last session prior to deliberations by the members, the military judge informed the parties of the instructions. When the members returned, he gave the limiting instruction to the members. There was no objection by the trial defense counsel.

The standard of review for alleged instructional error is *de novo*. *United States v. Kasper*, 58 M.J. 314, 318 (C.A.A.F. 2003). Absent objection by the trial defense counsel, the error, if any, is waived absent plain error. *United States v. Blough*, 57 M.J. 528, 534 (A.F. Ct. Crim. App. 2002). Even if the sentencing instructions were erroneous, we will not grant relief absent a showing of material prejudice to a substantial right. *Id.* If there is a Constitutional error, we may not affirm the case unless the error was harmless beyond a reasonable doubt. *United States v. Grijalva*, 55 M.J. 223, 228 (C.A.A.F. 2001); *United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002).

² “[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” Mil. R. Evid. 403.

³ Mil. R. Evid. 403.

The military judge did not err when giving his sentencing instructions, there was no plain error, and if there was, there is no material prejudice to a substantial right.

Trial Counsel's Sentencing Argument and Failure to Instruct

Prior to argument, the defense counsel informed the military judge that he would be requesting a bad-conduct discharge as an appropriate punishment. During argument, the trial counsel incorrectly stated that the appellant had said, “[P]lease sentence me to a bad-conduct discharge.” The military judge immediately interrupted the trial counsel and sent the members out of the courtroom. An Article 39a, UCMJ, session was conducted with the military judge informing the defense counsel that they had the option to request a mistrial or that the military judge could craft a curative instruction. The military judge also indicated he would be inclined to grant a mistrial. The defense counsel and the appellant discussed the issue, and requested a limiting instruction.

After calling the members back, the military judge instructed the members:

Members, before trial counsel continues his argument, you heard him make a reference to the fact that in his statement that the accused, Sergeant Urich, had, in fact, already asked for and conceded a bad conduct discharge. That, in fact, is wrong. He has not done that and when you go back to deliberate, you will, in fact, have an opportunity to review in total his unsworn statement that defense counsel read to you and in no where [sic] in that document does he state that. It was, in fact, a mistake by the trial counsel to have said that. I would instruct you not to consider that portion of the trial counsel's argument. And, again, as I'll tell you later on in the instructions, that's exactly why this is. It's argument. It's not evidence. Okay, so – that happens.

The military judge immediately interrupted the trial government counsel and with the defense counsel's and the appellant's concurrence, remedied the situation. The third issue is meritless.

Article 13, UCMJ, Credit

At trial, the defense counsel made a motion for illegal pretrial confinement credit. The basis of the motion was that the appellant's pay was withheld while he was in pretrial confinement and that was illegal punishment. Apparently, the finance office determined the appellant had been overpaid and recouped the payment from the appellant's pay. The military judge denied the motion.

Whether an appellant is entitled to credit for a violation of Article 13, UCMJ, 10 U.S.C. § 813, presents a “mixed question of law and fact.” *United States v. McCarthy*,

47 M.J. 162, 165 (C.A.A.F. 1997) (quoting *Thompson v. Keohane*, 516 U.S. 99, 113 (1995)). “We will not overturn a military judge’s findings of fact . . . unless they are clearly erroneous.” *United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). We “review *de novo* the ultimate question whether an appellant is entitled to credit for a violation of Article 13[, UCMJ].” *Id.* The totality of the circumstances is used to determine if conditions of restriction are tantamount to confinement. *See United States v. Regan*, 62 M.J. 299 (C.A.A.F. 2006).

The military judge made extensive findings of fact⁴ supported by the evidence and correct conclusions of law. His ruling was not clearly erroneous.

Sentence is Inappropriately Severe

The next issue is whether the approved sentence of two years confinement, total forfeitures, reduction to E-1, and a dishonorable discharge is inappropriately severe.

We “may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved.” Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant’s record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). After reviewing the entire record, we conclude that appellant’s sentence is not inappropriately severe.

*Failure to Announce Assembly of the Court*⁵

The military judge did not formerly announce that the court had been assembled as required by R.C.M. 911. However, “assembly is not dependent upon the actual announcement by the military judge, but occurs ‘when the voir dire of the members begins.’” *United States v. Hawkins*, 24 M.J. 257, 258-59 (C.M.A. 1987) (citing *United States v. Dixon*, 18 M.J. 310, 313-14 (C.M.A. 1984)).

*Moreno*⁶ Issue

We note that this case has been with this Court in excess of 540 days. In this case, the overall delay between the trial and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (1) length of the delay; (2) reasons

⁴ The military judge referenced *United States v. Fisher*, 61 M.J. 415 (C.A.A.F. 2005) for a detailed discussion of financial regulations and illegal punishment.

⁵ This issue was not raised but is addressed.

⁶ *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006).

for the delay; (3) the appellant's assertion of his right to timely review and appeal; and (4) prejudice. See *United States v. Moreno*, 63 M.J. 129, 135-36 (C.A.A.F. 2006). When we assume error, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case.

Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Conclusion

The approved findings and the sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

OFFICIAL



STEVEN LUCAS, YA-02, DAF
Clerk of the Court