UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class AKIO A. BISCHOFF
United States Air Force

ACM 37731

08 May 2013

Sentence adjudged 17 June 2010 by GCM convened at Beale Air Force Base, California. Military Judge: Vance H. Spath.

Approved sentence: Bad-conduct discharge, confinement for 1 year, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund, Lieutenant Colonel Gail E. Crawford; Major Anthony D. Ortiz; Captain Luke D. Wilson; Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Lieutenant Colonel C. Taylor Smith; Major Scott C. Jansen; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

GREGORY, HARNEY, and SOYBEL
Appellate Military Judges

PER CURIAM:

At a general court-martial composed of officer members, the appellant pled guilty to the wrongful use, distribution, and introduction of 3, 4-Methylenedioxy-methamphetamine ("Ecstasy"), in violation of Article 112a UCMJ, 10 U.S.C. § 912a. The panel sentenced the appellant to a bad-conduct discharge, confinement for one year, forfeiture of all pay and allowances, and a reduction to the lowest enlisted grade. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends that the military judge committed plain error by violating Rule for Courts-Martial (R.C.M.) 912(g)(1) when he required the appellant to exercise a peremptory challenge before the voir dire of members and determination of any challenges for cause had been completed. He also claims that the military judge violated the liberal grant mandate and requests relief because the 18-month post-trial processing standard has not been met.

Finding the military judge committed plain error by violating R.C.M. 912(g)(1), we return the record of trial to The Judge Advocate General for remand to the convening authority and authorize a rehearing on the sentence.

Background

The appellant contends that the military judge committed plain error by violating R.C.M. 912(g)(1) during the voir dire portion of the appellant's guilty plea proceeding. We agree. During voir dire, the appellant brought challenges against three Lieutenant Colonels (Lt Col): Lt Col PM, Lt Col CC, and Lt Col SJ.

After the initial group voir dire concluded, individual voir dire occurred for Lt Col PM, Lt Col CC, and Lt Col SJ. In Lt Col PM's individual voir dire, he indicated that he believed a certain minimum sentence must be imposed, based on the Air Force Instruction (AFI) regarding drug discharges. When asked whether he could consider the full range of punishment, including no punishment, Lt Col PM responded that he could not. During the respective individual voir dire sessions of Lt Col CC and Lt Col SJ, each member stated that he could follow the military judge's instructions and consider the full range of punishment.

Following individual voir dire but before the litigation of challenges, the military judge and counsel from both sides overheard through the courtroom walls a conversation taking place outside of the deliberation room. At a hearing outside of the members' presence, pursuant to Article 39(a), UCMJ, 10 U.S.C. § 839(a), the military judge advised the appellant that he held an informal R.C.M. 802 conference with counsel for both sides regarding the matter. The military judge also stated that, although it was unclear who was a party to the conversation, he believed Lt Col PM was involved, and the conversation may have involved "administrative discharges and the drug retention criteria."

Rather than continue with voir dire to determine who was involved with the conversation and what was discussed, the military judge stated that he would "take challenges now" and then would "bring the remaining panel members in to ask if any of them were involved in [the] discussion." If any members had been involved, he said, individual voir dire would be repeated with those members to determine the impact and then challenges for those members would be handled.

During the initial challenges, the Government successfully challenged Lt Col PM for cause without objection from the appellant. The appellant, however, unsuccessfully challenged Lt Col CC and Lt Col SJ for cause. The military judge then called for peremptory challenges at which point the appellant used his peremptory challenge on Lt Col CC. Lt Col SJ became president of the panel.

Following the initial challenges, individual voir dire was conducted on Lt Col SJ, at which time he confirmed that Lt Col CC and Lt Col PM discussed the AFI relating to mandatory discharges for drug use. Because Lt Col SJ overheard the discussion, the military judge asked, "Is there anything about that discussion that is going to cause you to believe a punishment in this case is more appropriate or less appropriate?" Lt Col SJ responded, "No, I don't think so." The military judge further clarified the difference between punitive discharges and administrative discharges, and ensured Lt Col SJ understood the distinction.

The appellant renewed his challenge for cause against Lt Col SJ arguing he was "forced" to use his peremptory challenge on Lt Col CC. In denying the renewed challenge, the military judge remarked that Lt Col SJ was "very up front about what he had heard, the discussion and his lack of any role in it other than being an innocent bystander." Thus, the military judge found that there was no implied bias "even using the liberal grant mandate."

Standard of Review

Questions on the interpretation of provisions of the R.C.M are questions of law, which we review de novo. *United States v. Dean*, 67 M.J. 224, 227 (C.A.A.F. 2009); *United States v. Hunter*, 65 M.J. 399, 401 (C.A.A.F. 2008). When interpreting the R.C.M., ordinary rules of statutory construction apply. *Hunter*, 65 M.J. at 401. Because the appellant did not object to the military judge's decision to call for challenges prior to the conclusion of examining panel members, however, we must review this under the plain-error doctrine. *See United States v. Robinson*, 38 M.J. 30, 31 (C.M.A. 1993); *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). Plain error occurs when: (1) an error was committed; (2) the error was plain, clear or obvious; and (3) the error resulted in material prejudice to substantial rights of the appellant. *Hardison*, 64 M.J. at 281 (citing *United States v. Powell*, 49 M.J. 460, 465 (C.A.A.F. 1998)). The appellant has the burden of persuading this Court that each element of the plain error test is satisfied. *Hardison*, 64 M.J. at 281.

Preemptory Challenges

R.C.M. 912(g)(1) allows each party to challenge one member peremptorily. *Id.* "No party may be required to exercise a peremptory challenge before the examination of members and determination of any challenges for cause has been completed." *Id.* "Failure to exercise a peremptory challenge when properly called upon to do so shall

waive the right to make such a challenge." R.C.M. 912(g)(2). This rule is intended to protect a party from being compelled to use a peremptory challenge before challenges for cause are made. Drafter's Analysis, *Manual for Courts-Martial, United States* (*MCM*), A21-62 (2008 ed.).

The military judge erred when he failed to comply with R.C.M. 912(g)(1). *See United States v. Savard*, 69 M.J. 211 (C.A.A.F. 2010) (finding error when the military judge failed to grant an Article 39(a), UCMJ, session, in violation of R.C.M. 905(h)). The military judge called for challenges after the initial voir dire had concluded, even though he noted there would be further voir dire to determine the consequences of the improper conversation heard outside the deliberation room. This resulted in the appellant being forced to use his peremptory challenge prior to "the examination of members and determination of any challenges for cause [had] been completed." R.C.M. 912(g)(1). Because it was unknown which panel members were involved in the improper conversation, without completing voir dire, the appellant was compelled to use his peremptory challenge before a full determination of challenges for cause could be made. Therefore, the military judge committed an error.

The error was also plain, clear, or obvious. *See Hardison*. In *Hardison*, our superior court held a military judge's error to be plain, clear, or obvious when the military judge violated R.C.M. 1001(b)(4), by admitting evidence that was not directly related to the offense. *Id.* at 283. Conversely, in *United States v. Maynard*, 66 M.J. 242, 245 (C.A.A.F. 2008), our superior court held that a military judge's failure to take sua sponte action was neither a clear nor obvious error. There, the defense counsel failed to object to prejudicial evidence relating to uncharged conduct as a trial tactic. *Id*.

In this case, calling for peremptory challenges before voir dire is completed is plain, clear, and obvious error. Like *Hardison*, where the military judge's decision violated an R.C.M., here the military judge's action violated R.C.M. 912(g)(1). *See Hardison*, 64 M.J. at 283. Unlike *Maynard*, where the judge failed to act, here the military judge overtly acted in contravention of R.C.M. 912(g)(1). *See Maynard*, 66 M.J. at 245. The rule clearly states that peremptory challenges will not be called for before voir dire is completed. R.C.M. 912(g)(1). The military judge called for peremptory challenges despite knowing that there could be additional successful causal challenges as a result of the improper conversation. Therefore, the error was plain, clear, and obvious.

Finally, the military judge's error resulted in material prejudice to a substantial right of the appellant. In *United States v. Cruse*, 50 M.J. 592 (C.A.A.F. 1999), our superior court held that the erroneous denial of a peremptory challenge materially prejudiced a substantial right. *Id.* at 598. There, the military judge erroneously denied the peremptory challenge by misapplying anti-discrimination rules found in *Batson v. Kentucky*, 476 U.S. 79 (1986). In applying a harmless error analysis, the Court could not "determine that the verdict was not 'swayed' by the error." *Cruse*, 50 M.J. at 598.

Similarly, in *United States v. Quintanilla*, 63 M.J. 29, 37 (C.A.A.F. 2006), our superior court recognized that "the erroneous denial of a defense causal challenge creates a significant burden on the statutory right of the defense to exercise a peremptory challenge to remove a member objectionable to the defense." Thus, the deprivation of a party's peremptory challenge is materially prejudicial to a substantial right.

At trial, the appellant was functionally deprived of a peremptory challenge because the military judge required the appellant to use his peremptory challenge prematurely on Lt Col CC. Subsequent voir dire may have revealed Lt Col CC to be subject to causal challenge. Unlike *Quintanilla*, where the military judge's erroneous ruling had no impact on the defense's right to exercise a peremptory challenge, here the military judge's erroneous voir dire procedure impacted the appellant's ability to exercise informed causal and peremptory challenges. Also unlike *Quintanilla*, where no members of the panel were accused of having implied bias, here defense counsel specifically challenged Lt Col SJ for implied bias. Thus, like in *Cruse*, we are unable to determine beyond a reasonable doubt that the results would not have been different had Lt Col SJ been removed peremptorily. Therefore, because the appellant was functionally deprived of his right to exercise a peremptory challenge, there was material prejudice to a substantial right.

We find the Government's arguments that the appellant either waived his rights under R.C.M. 912(g)(1) as a trial tactic or invited the error unpersuasive.[*] Therefore, because the military judge committed error, the error was plain and obvious and the error materially prejudiced a substantial right of the appellant, plain error exists. A rehearing as to sentence is authorized. Having set aside the sentence based on plain error in the military judge's noncompliance with R.C.M. 912(g)(1), we need not address the other issue raised regarding challenges.

Appellate Delay

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).

[*] While the appellant did not object to military judge's proposed course of action regarding challenges, the appellant stated that he was "forced" to use his peremptory challenge on Lieutenant Colonel CC during the first round of challenges, thereby expressing a degree of reluctance to follow the improper procedure. Therefore, the appellant's failure to object will be considered a forfeiture, or oversight, rather than a waiver.

Conclusion

The findings are correct in law and fact. The sentence is set aside. The record of trial will be returned to The Judge Advocate General for remand to the convening authority. A rehearing on sentence is authorized.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court