UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman CHRISTOPHER R. CAPOBIANCO
United States Air Force

ACM S31859

21 March 2012

Sentence adjudged 29 June 2010 by SPCM convened at Patrick Air Force Base, Florida. Military Judge: Grant L. Kratz.

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $436.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Major Nicholas W. McCue.

Appellate Counsel for the United States: Colonel Don M. Christensen; Colonel Thomas A. Monheim; Lieutenant Colonel Linell A. Letendre; Major Naomi N. Porterfield; and Gerald R. Bruce, Esquire.

Before

ORR, ROAN, and HARNEY
Appellate Military Judges

PER CURIAM:

Consistent with his pleas, a special court-martial composed of officer members convicted the appellant of one specification of dereliction of duty, one specification of divers use of cocaine, and one specification of dishonorably failing to pay a debt, in violation of Articles 92, 112a, and 134, UCMJ, 10 U.S.C. §§ 892, 912a, 934. The adjudged sentence consists of a bad-conduct discharge, 6 months of confinement, forfeiture of $964.00 pay per month for 6 months and reduction to the grade of E-1. The convening authority reduced the appellant's forfeitures to $436.00 pay per month for 6 months and approved the remaining sentence as adjudged.

On appeal, the appellant raises one issue for our consideration: whether the military judge erred by not advising the members that a punitive discharge was not the only means by which the appellant could be discharged from the Air Force.

Background

During the sentencing phase of the trial, the military judge provided the members with the following instruction regarding a punitive discharge:

> This court may adjudge a Bad Conduct Discharge. Such a discharge deprives one of substantially all benefits administered by the Department of Veterans Affairs and the Air Force establishment. A Bad Conduct Discharge is a severe punishment and is designed as a punishment for bad conduct rather than as a punishment for serious offenses of a military or civil nature.

Neither the appellant nor his counsel objected to the instruction as given.

After closing to deliberate, the members returned and asked the following questions: "Is a Bad Conduct Discharge the only discharge option available in this case? Are there any other types of discharge available? If so, what?" During an Article 39(a), UCMJ, 10 U.S.C. § 839(a), session, trial defense counsel requested the military judge instruct the members that, while they could only adjudge a punitive discharge, there were other procedures available for administrative discharge that were not within the members' purview to pronounce. The military judge denied defense counsel's request and answered the members' questions as follows:

> The answer to the first question, "Is a Bad Conduct Discharge the only discharge option available in this case," is "yes." Therefore the answer to the second, "Are there any other types of discharge available," is "no." And the third becomes moot by the answers to the first two questions.

On appeal, the appellant contends the military judge should have instructed the members that, "a bad conduct discharge is the only discharge available to this court. Other forms of discharge that might be available outside of this court are not relevant to your consideration of what is an appropriate punishment for this accused." The appellant argues the military judge's response to their questions was incorrect and misleading because it left the members with the impression that the only means available to separate the appellant was through a punitive discharge, rather than the possibility of an administrative separation after the court-martial.

Sentencing Instructions

We review the military judge's sentencing instructions for an abuse of discretion. *United States v. Hopkins*, 56 M.J. 393, 395 (C.A.A.F. 2002). The military judge is required to give the members appropriate sentencing instructions. Rule for Courts–Martial (R.C.M.) 1005(a). He must advise the members (1) of the maximum punishment, (2) of the effect any sentence would have on the accused's entitlement to pay and allowances, (3) of deliberation and voting procedures, (4) "that they are solely responsible for selecting an appropriate sentence and may not rely on the possibility of any mitigating action by the convening or higher authority," and (5) that they should consider all matters in extenuation, mitigation, and aggravation, whether introduced before or after findings, as well as other matters presented. R.C.M. 1005(e). However, "The military judge has considerable discretion in tailoring instructions to the evidence and law." *Hopkins*, 56 M.J. at 395. "While counsel may request specific instructions from the military judge, the judge has substantial discretionary power in deciding on the instructions to give." *United States v. Damatta–Olivera*, 37 M.J. 474, 478 (C.M.A. 1993) (citing *United States v. Smith*, 34 M.J. 200 (C.M.A. 1992)); *see also* R.C.M. 920(c), Discussion. By failing to object to sentencing instructions before the members begin to deliberate, an appellant waives any objection absent plain error. R.C.M. 1005(f). "Plain error occurs when (1) there is error, (2) the error is plain or obvious, and (3) the error results in material prejudice to a substantial right of the accused." *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005) (citing *United States v. Rodriguez*, 60 M.J. 87, 88-89 (C.A.A.F. 2004)). The appellant has the burden to establish plain error. *United States v. Cardreon*, 52 M.J. 213, 216 (C.A.A.F. 1999).

The possibility of receiving an administrative discharge in the event a punitive discharge is not adjudged is a collateral matter to a court-martial. *See United States v. Tschip*, 58 M.J. 275, 277 (C.A.A.F. 2003). "[C]ollateral consequences of a court-martial conviction should not be the concern of the court-martial and that instructions thereon should be avoided." *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997) (citing *United States v. McElroy*, 40 M.J. 368, 371–72 (C.M.A. 1994); *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988)). The military judge properly instructed the members regarding their statutory authority to sentence the appellant to a punitive discharge. Further, he correctly answered the members' questions with regard to whether a bad-conduct discharge was the only option available for them to adjudge if they decided that a punitive discharge was appropriate. The appellant has failed to show that the military judge's failure to provide the instruction now requested materially prejudiced a substantial right of the appellant. We therefore find no error in the military judge's response to the members' inquiries.

Article 134, UCMJ

The appellant was charged with dishonorably failing to pay a just debt, in violation of Article 134, UCMJ. The Government did not allege either Clause 1 or Clause 2 of Article 134, UCMJ, in the specification. Our superior court recently held that failure to allege the terminal element of an Article 134, UCMJ, offense is error but, in the context of a guilty plea, the error is not prejudicial where the military judge correctly advises the appellant of all the elements and the providence inquiry "shows that the appellant understood 'to what offense and under what legal theory [he was] pleading guilty.'" *United States v. Ballan*, No. 11-0413/NA, slip op. at 14, 16, 18-19 (C.A.A.F. 1 March 2012) (quoting *United States v. Medina*, 66 M.J. 21, 26 (C.A.A.F. 2008) (alterations in original). Having fully reviewed the entire record of trial, we are convinced the appellant suffered no prejudice to a substantial right: he knew under what clause he was pleading guilty and clearly understood how his conduct violated the terminal elements of Article 134, UCMJ.

Conclusion

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 E. Dixon

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Deputy Clerk of the Court