UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOHN W. COLVETT
United States Air Force

ACM 38079

01 August 2013

Sentence adjudged 09 December 2011 by GCM convened at Andersen Air Base, Guam. Military Judge: Vance H. Spath (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 140 days, and reduction to E-1.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Captain Nicholas D. Carter.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jason S. Osborne; and Gerald R. Bruce, Esquire.

Before

ORR, HELGET, and WEBER
Appellate Military Judges

PER CURIAM:

In accordance with his pleas before a general court-martial comprised of a military judge sitting alone, the appellant was found guilty of one charge and specification of methamphetamine use, plus an additional charge and specification of methamphetamine use, both in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The military judge sentenced the appellant to reduction to the grade of E-1, 140 days confinement and a bad-conduct discharge (BCD). The appellant had entered into a pretrial agreement which did not affect the convening authority's ability to approve the adjudged sentence. After waiving mandatory forfeitures for four months for the benefit of the appellant's wife, the convening authority approved the sentence as adjudged.

On 30 June 2011, the appellant was selected for a random urinalysis. His sample tested positive for methamphetamine. The Government preferred a charge and specification of methamphetamine use against the appellant on 13 September 2011. Two days after preferral, he was selected for another random urinalysis, which also came back positive for methamphetamine. The Government then preferred an additional charge and specification of methamphetamine use. After securing a pretrial agreement with the convening authority, the appellant admitted both methamphetamine uses during his providency inquiry, noting that the second use occurred shortly after the first charge and specification were preferred against him.

On appeal, the appellant argues that his BCD represents an inappropriately severe sentence, and that trial counsel's argument improperly blurred the lines between a punitive discharge and administrative separation.[1] We disagree, and affirm the findings and sentence of the court-martial.

Sentence Appropriateness

The appellant argues that the adjudged and approved BCD is inappropriately severe in light of his service record, which included two deployments, the lack of previous disciplinary action, and character statements submitted on the appellant's behalf. This Court "may affirm only . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." Article 66(c), UCMJ. 10 U.S.C. § 866(c). We review sentence appropriateness de novo, employing "a sweeping congressional mandate" to ensure "a fair and just punishment for every accused." *United States v. Baier*, 60 M.J. 382, 384 (C.A.A.F. 2005) (citations omitted). This task requires "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). In conducting this review, we must also be sensitive to considerations of uniformity and even-handedness. *United States v. Sothen*, 54 M.J. 294, 296 (C.A.A.F. 2001) (citing *United States v. Lacy*, 50 M.J. 286, 287–88 (C.A.A.F. 1999)). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395–96 (C.M.A. 1988). We have reviewed the record of trial, giving individualized consideration to this appellant on the basis of the nature and seriousness of his offense and his character. We find that the approved and adjudged sentence, including the BCD, is not inappropriately severe.

[1] The appellant raised both issues pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

Trial Counsel Argument

In sentencing, the Government argued for eight months of confinement, a BCD, and reduction to E-1. Trial counsel's argument for the BCD focused on the assertion that the accused's misconduct warranted such a characterization, and noted the deterrent effect a BCD would have. Trial counsel then stated, "To not offer [sic] a [BCD] sends the message that you can knowingly and deliberately break the law and still serve your country honorably." Trial counsel followed this up by stating, "To not give a BCD sends the message that the values of the Air Force have deteriorated to such a level that we are no longer shocked and appalled when we find criminals in our midst."

Trial defense counsel did not object to trial counsel's argument. However, on appeal, the appellant asserts that this argument – specifically the sentence that not imposing a BCD would send a message that lawbreakers could still serve their country honorably – was improper. He alleges that it blurred the lines between a punitive discharge and administrative separation, leading the sentencing authority to believe that if a punitive discharge was not adjudged, the appellant would receive an honorable characterization of service.

Absent objection, allegations of improper argument are reviewed for plain error, requiring the appellant to demonstrate that 1) there was an error, 2) it was plain or obvious, and 3) the error materially prejudiced a substantial right. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007). A punitive discharge is "not intended to be a vehicle to make an administrative decision about whether an accused should be retained or separated." *United States v. Ohrt*, 28 M.J. 301, 306 (C.M.A. 1989). Therefore, trial counsel's sentencing argument may not blur "the distinction between a punitive discharge and administrative separation from the service." *United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992). When determining whether an argument was improper, the argument "must be viewed within the context of the entire court-martial. The focus of our inquiry should not be on words in isolation, but on the argument as 'viewed in context.'" *United States v. Baer*, 53 M.J. 235, 238 (C.A.A.F. 2000) (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)).

Viewing trial counsel's entire argument, we find no error in his brief statement urging the military judge that not imposing a BCD would send a message that lawbreakers could still serve their country honorably. Trial counsel's overall advocacy unmistakably focused on why a BCD was appropriate for this particular case, and trial counsel immediately followed up the statement at issue with an appropriate plea that a BCD would properly express the shock and repugnance the military should feel toward those who repeatedly break the law in this manner. In addition, even assuming there was plain error in the military judge allowing trial counsel's statement, that error did not prejudice a material right of the appellant. The military judge is presumed to know the law and apply it correctly, filtering out objectionable material to reach a proper outcome.

United States v. Rodriguez, 60 M.J. 87, 90 (C.A.A.F. 2004). We are confident that this military judge understood the difference between a punitive discharge and the possibility of administrative separation.

Conclusion

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

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court