UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman DANIEL A. DUGAN
United States Air Force

ACM 34477

20 March 2002

Sentence adjudged 16 December 2000 by GCM convened at Eglin Air Force Base, Florida. Military Judge: Mary M. Boone.

Approved sentence: Bad-conduct discharge, confinement for 9 months, reduction to E-1, forfeiture of all pay and allowances until the approved confinement is lawfully terminated, and thereafter, forfeitures of $695.00 pay per month until the punitive discharge is executed.

Appellate Counsel for Appellant: Colonel James R. Wise, Lieutenant Colonel Timothy W. Murphy, and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo and Lieutenant Colonel Lance B. Sigmon.

Before

SCHLEGEL, ROBERTS, and PECINOVSKY
Appellate Military Judges

OPINION OF THE COURT

SCHLEGEL, Senior Judge:

The appellant entered mixed pleas at his general court-martial. He was convicted of failing to go to his place of duty, being absent without leave (AWOL), wrongfully using methylenedioxymethamphetamine (ecstasy), dishonorably failing to pay a just debt, and possessing and using a false military identification card, in violation of Articles 86, 112a, and 134, UCMJ, 10 U.S.C. §§ 886, 912a, 934. His approved sentence included a bad-conduct discharge, confinement for 9 months, reduction to the grade of E-1, and forfeiture of all pay and allowances until such time as the approved confinement was lawfully terminated, and then forfeitures of $695.00 pay per month until execution of the

punitive discharge. The appellant complains the trial judge erred by failing to convene a post-trial session pursuant to Rule for Courts-Martial (R.C.M.) 1102, and that the portion of the approved sentence involving forfeitures violates R.C.M. 1003(b)(2). After reviewing the appellant's arguments, we affirm the findings and sentence.

I. Background

The appellant entered pleas of guilty to all of the charges, except AWOL. His defense on this charge was lack of mental responsibility. He elected to be tried by a panel of officers. During general voir dire, defense counsel asked if any court member attended the convening authority's commander's call several weeks before the court-martial. Four court members answered affirmatively. The appellant only questioned two of the four individually about the commander's call. Both recalled that at some point during the meeting, the convening authority addressed the topic of drug abuse. The first court member paraphrased the comment as, "drug use was incompatible with military service." The second court member recalled the convening authority saying drug use was prevalent on the gulf coast of Florida. They agreed that the appellant's case was not discussed. The second court member also said punishment was never discussed and that he would not be influenced by the convening authority's comments. The first court member was challenged for cause for other reasons. None of the other court members who attended the commander's call were challenged.

On 22 February 2001, before authentication of the record of trial, there was a telephone conference call involving the judge and counsel. During the call, the judge was given a statement allegedly written by a female court member. The statement, which was neither signed nor sworn, identified some concerns she had during deliberations on the sentence. First, she believed that some court members did not give due consideration to the mitigating factors. The thrust of the appellant's sentencing case was that he should not be confined because he was at risk for suicide and would not be able to get meaningful mental health treatment. This tact was taken despite the fact that he had already served 150 days in pretrial confinement. Another concern was that some court members did not appreciate the "significance" of a bad-conduct discharge. She was also disturbed about the commander's call, and that some court members were aware the convening authority would review the sentence. She ended by acknowledging that she agreed with the adjudged sentence, except for the period of confinement. The defense counsel asked the judge to convene a post-trial session to inquire into these allegations. Instead, the judge directed defense counsel to provide an affidavit specifying how he came into possession of the statement.

On 15 March 2001, the judge found that any comments made by the court members during deliberations on sentence occurred after they received all of the evidence and were free to give that evidence whatever weight they deemed appropriate. She also found that there was no evidence the court members failed to disclose significant

information during voir dire. The judge concluded the statement provided no evidence of unlawful command influence, and denied the request for a post-trial hearing. The convening authority was informed about the defense request for a post-trial hearing and the judge's ruling. The appellant waived submission of clemency matters to the convening authority.

II. Denial of Post-Trial Hearing

The appellant asserts that the court member's statement raises the issue of unlawful command influence and that the judge erred by failing to convene a post-trial hearing. He requests that we order a hearing pursuant to *United States v. Dubay*, 37 C.M.R. 411 (1967).

Analysis

Mil. R. Evid. 606(b) provides that a court member,

> may not testify as to any matter or statement occurring during the course of the deliberations of the members of the court-martial or, to the effect of anything upon the member's or any other member's mind or emotions as influencing the member to assent to or dissent from the findings or sentence or concerning the member's mental process . . .

However, the rule does permit a court member to testify about "whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial, whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence." *Id*. "[T]he general and common knowledge a court member brings to deliberations is an intrinsic part of the deliberative process, and evidence about that knowledge is not competent evidence to impeach the members' findings or sentence." *United States v. Straight*, 42 M.J. 244, 250 (1995).

Unlawful command influence referenced in Mil. R. Evid. 606(b) includes the external or internal use of rank to affect the outcome of the trial. *United States v. Accordino*, 20 M.J. 102, 104 (C.M.A. 1985). "There must be more than a mere allegation of command influence to raise the issue; there must be evidence." *United States v. Loving*, 41 M.J. 213, 238 (1994) (citing *United States v. Levite*, 25 M.J. 334, 341 (C.M.A. 1987)). *See also United States v. Biagase*, 50 M.J. 143, 150 (1999). We review a judge's decision to hold a post-trial session for an abuse of discretion. *United States v. Ruiz*, 49 M.J. 340, 348 (1998) (convening authority's decision not to order a post-trial hearing reviewed for an abuse of discretion).

In *Straight*, our superior court, relying on case law from the federal circuits, made it clear that the exceptions contained in Mil. R. Evid. 606(b) apply when information or influence from outside the court-martial process raises a question about the validity of a sentence. While the court left open the question of when an individual court member's knowledge about people or issues constitutes such an extrinsic influence, the "generalized common knowledge" based on a court member's experience, training, and schooling does not require an investigation or inquiry. *Straight*, 42 M.J. at 250. Furthermore, the intrinsic deliberative process of court members is not subject to investigation. *United States v. Combs*, 41 M.J. 400, 401 (1995).

The appellant concedes that most of the "areas of concern" in the statement do not call into question the validity of his sentence. This court member placed great weight in the testimony of the appellant's expert witness that he was a suicide risk if confined and that he would not receive meaningful treatment in confinement. The fact that the other members viewed the expert's testimony differently is simply part of the dynamic process of deliberation, which is not an appropriate area for inquiry. Mil. R. Evid. 606(b).

We are left to resolve whether there is sufficient evidence of unlawful command influence to support the appellant's request that we order a *Dubay* hearing to insure the validity of the sentence. Our first observation is that this situation is like the fisherman who indiscriminately wades into a slow moving creek, kicks up clouds of mud, then complains the water is too murky to fish. It is general knowledge within the Air Force that a commander's call covers a wide variety of topics. The court members defense counsel elected to question individually said that when the subject turned to drugs, the convening authority repeated what everyone in the Air Force has heard many times before, that drug use is incompatible with military service. The issue before us is whether there is any evidence that the convening authority's purpose in repeating this often used phrase at a command meeting was to influence the court members. *United States v. Baldwin*, 54 M.J. 308, 310 (2001).

The commander's call was held several weeks before the appellant's court-martial. The convening authority informed the attendees that drug use was prevalent on the gulf coast of Florida, and that it was incompatible with military service. Neither of these assertions is novel or shocking, and common sense tells us that they were not intended to influence the outcome of any court-martial. More importantly, no reasonable individual could view these comments as an exhortation to impose a minimum sentence on anyone who used drugs. *See United States v. Martinez*, 42 M.J. 327, 332 (1995). The appellant's name was never mentioned nor was even a veiled reference made to his case. These facts are easily distinguishable from *Baldwin*.

We also find that the alleged comments that the convening authority would know their names and review the sentence, and that the sentence should not appear to be too lenient, do not support the appellant's claim of unlawful command influence. Rather, they reflect the reality of the military justice system and the basic nature of the deliberative process. One of the first things a court member does, after taking the oath, is examine the court-martial convening order to insure their name, rank, and organization are correct. The order also contains the name and rank of the convening authority. In addition, the judge instructs the court members not to adjudge an excessive sentence based on any possible mitigating action by the convening or higher authority. The cumulative effect of this information is that court members know the convening authority selects them to serve on the court-martial and reviews the sentence.

The convening authority's role before and after a court-martial is a matter of statute. Articles 22, 23, 24, 25, 29, 34, 56a, 57, 57a, 58a, 58b, and 60, UCMJ, 10 U.S.C. §§ 822, 823, 824, 825, 829, 834, 856a, 857, 857a, 858a, 858b, 860. However, a statute also prohibits the convening authority from influencing a court-martial. Article 37, UCMJ, 10 U.S.C. § 837. Therefore, the convening authority's exercise of his statutory responsibility and the members' awareness of that role, without more, does not amount to unlawful command influence because no policy or preference can be imputed to the commander for doing what he is required to do.

The court members' duty to determine an appropriate sentence is somewhat analogous to Goldilock's quest for the perfect mattress. They are directed to craft a sentence that is just right for an accused. The judge instructs them to consider the five principles of sentencing: rehabilitation; punishment; protection of society; preservation of good order and discipline in the military; and deterrence of both the accused and others. These principles are fundamentally different and not easily reconciled. So while the court member who wrote the statement placed more emphasis on the rehabilitation of the appellant, the fact that others did not is simply part of the process of arriving at an appropriate sentence.

Finally, the subjective nature of the court member's complaint can best be illustrated by a few facts in this case, which we limit to confinement because this was the issue that drove the court member's letter. The maximum confinement for the appellant's offenses was 109 months (9 years and 1 month). The prosecution argued for confinement between 12 and 18 months. The defense counsel argued for time served, 5 months. The court members split that almost right down the middle, adjudging 9 months. It appears to us that the panel decided the trial counsel's request for confinement was a little too high and that defense counsel's was a little too low, and that somewhere between those two positions was just right. It would seem the court members did exactly what they were told to do by the judge. Therefore, we find no evidence of command influence, and deny the appellant's request for a *Dubay* hearing.

III. Whether the Forfeitures Violate Rule for Courts-Martial (R.C.M.) 1003(b)(2)

In *United States v. York*, 53 M.J. 553, 555 (A.F. Ct. Crim. App. 2000) we held a convening authority can mitigate forfeitures to two-thirds pay per month until a punitive discharge is executed as long as neither the total amount forfeited nor the duration of the forfeiture exceed the jurisdiction of the court-martial. This is precisely what the convening authority did in this case. Therefore, we resolve this issue against the appellant.

The 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; *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

LAURA L. GREEN
Clerk of Court