UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant DOROTHY A. HEATHINGTON
United States Air Force

ACM S31912

10 October 2012

Sentence adjudged 18 January 2011 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Matthew D. Van Dalen (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 60 days, and reduction to E-3.

Appellate Counsel for the Appellant: Captain Travis K. Ausland.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Matthew F. Blue; and Gerald R. Bruce, Esquire.

Before

ROAN, CHERRY, and MARKSTEINER
Appellate Military Judges

PER CURIAM:

Consistent with her pleas, the appellant was convicted, by a military judge sitting as a special court-martial, of three specifications of wrongful use of methamphetamines, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The appellant was sentenced to a bad-conduct discharge, confinement for 60 days, and reduction to E–3. The convening authority approved the sentence as adjudged. On appeal, the appellant asserts her sentence must be set aside because the assistant trial counsel (ATC) made improper comments during sentencing argument that materially prejudiced a substantial right of the appellant.

Sentencing Argument

The appellant argues that this Court should set aside her sentence because she was unfairly prejudiced by statements made by the ATC during the sentencing argument. Specifically, the appellant argues that the ATC: improperly referenced the appellant's duty position (crypto linguist working various drug interdiction programs) and her top security clearance (TS); inferred that, although the appellant was convicted of three uses, there were likely more undiscovered uses;[1] engaged in name calling; commented on the appellant's exercise of her right to remain silent; argued facts not in evidence;[2] invoked her personal opinion;[3] and appealed to superior authority.[4]

"When a defense attorney fails to object to a sentencing argument at the time of trial, appellate courts review the statement for plain error." *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted). The trial defense counsel's (TDC) sole objection to the ATC's sentencing argument regarded the ATC's reference to the appellant's TS background investigation. Noting "permissible inference," the military judge initially overruled the TDC's objection, but at the close of the TDC's sentencing surrebuttal argument, the military judge sua sponte revisited the issue, asking the ATC if there was evidence that any portion of the background investigation had been conducted subsequent to the dates encompassing the charged misconduct. After the ATC responded "no," the military judge reversed his previous ruling, observing that "[i]t appears that [the background investigative procedures] are not relevant to the actual drug offenses in this case, so I'm going to disregard that portion of your argument." Because the military judge sustained the TDC's only objection to the ATC's argument, the analysis turns to whether the military judge committed plain error in not addressing the remainder of the ATC's argument.

In order to prevail under a plain error theory, an appellant must demonstrate that (1) there was an error, (2) it was plain or obvious, and (3) the error materially prejudiced a substantial right. *Id*.

The appellant's case was tried before a military judge sitting alone. "Military judges are presumed to know the law and to follow it absent clear evidence to the contrary." *Id*. at 225 (citing *United States v. Mason*, 45 M.J. 483, 484 (C.A.A.F. 1997)). The Court of Appeals for the Armed Forces has also recognized, "[a]s part of this

[1] For example, the appellant points out assistant trial counsel's (ATC) argument that, "She made the conscious decision time and time and time again, and only got caught three times. . . . We know she was using more. She admitted she was using more."

[2] The appellant notes that the ATC argued that the appellant would have access to drug and alcohol rehabilitation services if she were sentenced to a period of confinement, despite the absence of evidence on record to such facts.

[3] The appellant points, as an example, to ATC's statement that "if this isn't a case where a BCD is warranted, I don't know what is."

[4] The appellant avers that the ATC appealed to higher Air Force authority when she stated, "So the answer to the question is yes, the Air Force does severely punish for these types of crimes."

presumption we further presume that the military judge is able to distinguish between proper and improper sentencing arguments." *Id.*; *see also United States v. Bridges*, 66 M.J. 246 (C.A.A.F. 2008) ("As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary.")

In the case before us, we need not conduct an example-by-example analysis of the appellant's proffered instances of improper argument because the record provides no evidence rebutting the presumption that the military judge knew and followed the law or that the military judge was improperly swayed by the comments to which the appellant takes exception. Even assuming, without finding, that any – or even all – of the ATC's comments could be considered to constitute improper argument, there is no evidence of material prejudice to a substantial right of the appellant. Despite the appellant's repetitive drug use, the latter two instances of which occurred while the appellant was awaiting a discharge in lieu of court-martial for the first use, the military judge imposed a sentence considerably more lenient than the one requested by the ATC. Moreover, the military judge reconsidered his initial decision to overrule TDC's objections and definitively stated he would disregard those comments, exhibiting his ability to discount improper argument. Under these circumstances, we are confident that any impermissible comments made by the ATC did not have a prejudicial impact on the adjudged sentence.

The appellant has not demonstrated that any error materially prejudiced her substantial rights.

Appellate Delay

Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals 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) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *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. *See 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 the 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.

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 approved findings and the sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court