UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JUAN H. SALAS
United States Air Force

ACM 37949

6 August 2013

Sentence adjudged 22 March 2011 by GCM convened at Malmstrom Air Force Base, Montana. Military Judge: Martin T. Mitchell; David S. Castro (arraignment).

Approved Sentence: Bad-conduct discharge, confinement for 20 months, and forfeiture of all pay and allowances.

Appellate Counsel for the Appellant: Major Anthony D. Ortiz and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Tyson D. Kindness; and Gerald R. Bruce, Esquire.

Before

ROAN, HELGET, and MARKSTEINER
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

HELGET, Senior Judge:

A general court-martial composed of officer members convicted the appellant, in accordance with his pleas, of one specification of divers wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. Contrary to his pleas, the appellant was convicted of one specification of wrongfully distributing cocaine, in violation of

Article 112a, UCMJ.[1] The members sentenced the appellant to a bad-conduct discharge, confinement for 20 months, and forfeiture of all pay and allowances. The convening authority approved the adjudged sentence.

Before this Court, the appellant raises four assignments of error: (1) Whether the military judge erred when he denied the trial defense counsel's motion to compel a forensic psychologist; (2) Whether the military judge erred when he denied the trial defense counsel's motion to compel production of and immunity for a potential witness; (3) Whether the military judge committed plain error when he did not abate the proceedings when there was no indication that the prosecution forwarded the defense request for immunity for a potentially exculpatory witness; and (4) Whether the appellant's sentence is inappropriately severe. Although not raised, we will also address whether the appellant's post-trial processing rights were violated as it has been more than 540 days since this case was docketed with this Court. Finding no error that materially prejudices a substantial right of the appellant, we affirm.

Background

The appellant pled guilty to using cocaine on three separate occasions. At the time of trial, he was 19 years old and had been on active duty since 9 June 2009.[2] While he was in technical school at Lackland Air Force Base (AFB), Texas, between November 2009 and January 2010, the appellant used cocaine with three other Airmen: Airman Basic (AB) Aaron Lopez, then-Airman (Amn) Reid Spell, and then-Amn Jacob Capps.[3] AB Lopez knew a local civilian in San Antonio named "Frank" who would supply the cocaine. The appellant stated that each time he used cocaine, it was at a different location. The first time was in the dorms on Lackland AFB, the second time was off base in AB Lopez's car, and the third time was at a hotel in San Antonio.

Motion to Compel Forensic Psychologist

The appellant's first assignment of error is that the military judge abused his discretion in denying his motion to compel the production of an expert forensic psychologist. We disagree.

We review a military judge's ruling on a request for expert assistance for an abuse of discretion. *United States v. Lloyd*, 69 M.J. 95, 99 (C.A.A.F. 2010) (citation omitted). An abuse of discretion occurs when: (1) the findings of fact predicating the ruling are not supported by the evidence of record; (2) incorrect legal principles were used; or (3) an

[1] The appellant was charged with the wrongful distribution of cocaine on divers occasions but was only found guilty of wrongful distribution on one occasion.
[2] The appellant joined the Air Force when he was 17 years old.
[3] Airmen Spell and Capps were subsequently discharged from the Air Force, and will thus hereafter be referred to as Mr. Spell and Mr. Capps.

application of the correct legal principles to the facts is clearly unreasonable. *United States v. Ellis*, 68 M.J. 341, 344 (C.A.A.F. 2010) (citing *United States v. Mackie*, 66 M.J. 198, 199 (C.A.A.F. 2008)). The "standard is a strict one, calling for more than a mere difference of opinion. The challenged action must be arbitrary, fanciful, clearly unreasonable, or clearly erroneous." *United States v. McElhaney*, 54 M.J. 120, 130 (C.A.A.F. 2000) (internal quotation marks and citations omitted). Indeed, "[w]hen judicial action is taken in a discretionary matter, such action can not be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of the relevant factors." *Ellis*, 68 M.J. at 344.

"An accused is entitled to expert assistance by the Government if he can demonstrate necessity." *Lloyd*, 69 M.J. at 99. (citing *United States v. Gunkle*, 55 M.J. 26, 31 (C.A.A.F. 2001)). "[T]he accused has the burden of establishing that a reasonable probability exists that (1) an expert would be of assistance to the defense and (2) that denial of expert assistance would result in a fundamentally unfair trial." *United States v. Freeman*, 65 M.J. 451, 458 (C.A.A.F. 2008). To satisfy the first prong of this test, our superior court applies a three-part test where "[t]he defense must show (1) why the expert is necessary; (2) what the expert would accomplish for the accused; and (3) why defense counsel is unable to gather and present the evidence that the expert would be able to develop." *United States v. Gonzalez*, 39 M.J. 459, 461 (C.M.A. 1994). An accused is only entitled to competent expert assistance, not assistance of his own choosing. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). *See also United States v. Warner*, 62 M.J. 114, 120 (C.A.A.F. 2005).

On 30 September 2010, one charge with one specification of divers wrongful use of cocaine and one specification of divers wrongful distribution of cocaine were preferred against the appellant, both in violation of Article 112a, UCMJ. On 10 December 2010, the charge and specifications were referred to a general court-martial. On 19 January 2011, the appellant was arraigned.

On 3 February 2011, the trial defense counsel moved for an inquiry into the appellant's mental capacity or mental responsibility under Rule for Courts-Martial (R.C.M.) 706. The military judge concurred and ordered a sanity board that same day.

On 11 February 2011, the sanity board inquiry was completed. The summarized report of the board's evaluation revealed that the appellant was diagnosed with major depressive disorder and alcohol abuse. The board concluded that the appellant was able to appreciate the wrongfulness of his conduct at the time of the offense, understood the nature of the proceedings against him, and was able to cooperate intelligently in his defense.

On 16 February 2011, the trial defense counsel requested the appointment of a specific confidential expert in the field of forensic psychology, Dr. James M. Meredith, PhD. In the request, the trial defense counsel reasoned that:

> Some forms of emotional or mental defects have been held to have high probative value. A "conservative list of such defects would have to include . . . most or all of the neuroses . . . alcoholism, drug addiction, and psychopathic personality." The Defense requires expert assistance to assist the Defense in addressing whether AB Salas is suffering from any such emotional or mental defect(s) and, if so, what effect the combination of any such defect(s) might have had on his ability to form various levels of intent, or his ability to assess right and wrong. Further, AB Salas has blood relatives, including his mother, who have been diagnosed with bipolar disorder. There are also issues of physical/sexual abuse that took place with AB Salas when he was younger. Questions also exist as to the impact of AB Salas['s] use of alcohol as a coping skill to deal with social anxiety and negative feelings/situations. Additionally, if alleged drug use took place, there is an issue of how those substances influenced his actions or exa[c]er[b]ated his underlying mental conditions. Only a properly-trained forensic psycholo[gist] can assist the Defense in exploring any issues related to how those factors may have impacted AB Salas' mental state. Finally, there appears to be a family history of not only mental illness, but also drug abuse and alcoholism.

The request also stated that the expert could assist in offering an opinion on the appellant's mental state at the time of the allegations and could help the defense determine if there were any potential extenuation and mitigation evidence relevant for sentencing. On 23 February 2011, the Government designated Captain (Capt) Jeremy Jensen, a psychiatrist stationed at Malmstrom AFB, MT, as a confidential expert consultant.

On 26 February 2011, the appellant filed a motion to compel the production of Dr. Meredith as an expert confidential consultant in the field of forensic psychology. The motion stated that a forensic psychologist was needed to "help determine whether AB Salas' mental state made him unable to understand or appreciate the wrongfulness of the alleged misconduct." The defense also needed a forensic psychologist to explore all available defenses in the case. Further, the motion stated, "a forensic psychologist is necessary to assist the defense with some of the following issues: mental defects, including ADD, bi-polar disorder, substance abuse, society anxiety, major depression, and how those elements can be impacted by the use of narcotics." The defense also stated that they needed a forensic psychologist to explore matters of extenuation and mitigation.

For purposes of the motion, the appellant was called as a witness by the defense. The appellant testified that he was placed in a foster home when he was very young because his mother had been diagnosed with bipolar disorder and his father was an alcoholic. His foster father sexually abused his older sister and he was diagnosed with attention deficit disorder at age six. Also, his mother attempted suicide while he was in basic training. He further stated that during the sanity board inquiry, he was required to take the Minnesota Multiphasic Personality Inventory-2 (MMPI-2), which he rushed through in approximately 45 minutes. According to Dr. Kevin Ingram, who conducted the sanity board, the MMPI-2 should normally take an hour and a half to three hours. Additionally, the test results on the validity scales revealed that the MMPI-2 was not valid for producing a psychological profile. The appellant testified that he knew what he used was cocaine, that cocaine was an illegal substance, and that his use of cocaine was wrongful.

The defense also called Capt Jensen who testified that he had never performed any forensic assessments or tests by himself and that he was unqualified to do so. Capt Jensen stated that he could refer someone for a forensic evaluation, and he would be able to understand the results of the evaluation, but he was not qualified to perform a criminal confidence evaluation or a capacity evaluation. However, Capt Jensen did testify that he treated approximately four patients per day, and had treated patients who had had a major depressive disorder, a history of alcohol abuse, a history of being sexually abused when they were children, family members who were sexually abused as children, and family members who had attempted suicide and had had bi-polar disorder.

The Government informed the military judge that it did not intend to call an expert witness in its case. At trial, the appellant did not raise the affirmative defense of lack of mental responsibility. *See* R.C.M. 916(k).

After considering the evidence and argument on this issue, the military judge made succinct findings of fact, conclusions of law, and found that the defense had failed to show the necessity for an expert consultant. The military judge stated the following:

> The defense has failed to show the necessity of an expert consultant. [The appellant] has been evaluated by a properly constituted sanity board and found to have understood the wrongfulness of his conduct and to assist in his own defense. The defense asserts that the case hinges on the issue of physical and mental well-being of [the appellant] but has not provided notice of any affirmative defenses. The Government must prove beyond a reasonable doubt that the use and distribution were knowing and wrongful. [The appellant], in his Air Force Form 1168, indicates that he knowingly used cocaine. Furthermore, during his testimony on this motion [the appellant] stated that he knew using cocaine was "not a good thing to do." There has been no showing of how the psychological issues and the

assistance of an expert consultant would create a reasonable probability of assistance to the defense and that denial would result in a fundamentally unfair trial.

The military judge further ruled that even if the defense was entitled to an expert consultant, he found Capt Jensen to be a competent expert and an adequate substitute under R.C.M. 703(d).

After his ruling, the military granted the trial defense counsel's request for a continuance to provide sufficient time for Capt Jensen to evaluate the appellant. At trial, the trial defense counsel did not renew his request a forensic psychologist nor was Capt Jensen called to testify.

We find that the military judge did not abuse his discretion is this case. The defense failed to establish that an expert consultant would be of assistance to the defense and that denial of an expert would result in a fundamentally unfair trial. Even if we were to have determined that the defense did meet his burden, we find that the Government provided the appellant with a reasonable substitute. Although Capt Jensen was not as qualified as the forensic psychiatrist requested by the defense, he was a board-eligible psychiatrist stationed at Malmstrom AFB, and qualified to provide the defense with any necessary assistance in the field of psychiatry. Further, after being afforded sufficient time to allow Capt Jensen's evaluation of the appellant, the trial defense counsel made no further objection to his appointment, nor was he called as a witness. Accordingly, we find the appellant suffered no prejudice by the appointment of Capt Jensen as an expert consultant.

Motion to Compel Production of Witness

The second assignment of error concerns the military judge's denial of the defense motion to compel the production of Mr. Capps as a witness for both findings and sentencing. We review a military judge's ruling on a request for a witness for an abuse of discretion. *United States v. McElhaney*, 54 M.J. 120, 126 (C.A.A.F. 2000). A military judge's decision not to abate the proceedings is also reviewed for an abuse of discretion. *United States v. Ivey*, 55 M.J. 251, 256 (C.A.A.F. 2001).

On 31 January 2011, the trial defense counsel requested the presence of Mr. Capps. On 2 February 2011, the defense timely included Mr. Capps in their notice of witnesses, and on 3 February 2011, the defense requested immunity for Mr. Capps. On 16 February 2011, the trial counsel notified the trial defense counsel that his request for Mr. Capps was denied, pending receipt of additional information. That same day, the defense filed a motion to compel the production of Mr. Capps.

At trial, the trial defense counsel called the appellant to testify for the purposes of the motion. He testified that he met Mr. Capps when they were in technical school together at Lackland AFB, Texas. He further testified that he witnessed Mr. Capps use cocaine on two occasions. The first time was in the dorms, and the second time was at a hotel in San Antonio. The appellant explained that his friend AB Lopez obtained the cocaine that they used from a local civilian, named Frank.

On 11 March 2011, the appellant completed an Air Force Form 1168, *Statement of Suspect/Witness/Complainant*. His statement admits his use of cocaine with both AB Lopez and Mr. Capps, along with other Airmen. AB Lopez, who at the time was in confinement at the Miramar Naval Brig, also testified during the motion pursuant to a grant of immunity. He stated that he was present for both of the times the appellant testified about using cocaine with Mr. Capps. AB Lopez said that he and his friends would divide the mutually acquired cocaine for their individual use. Usually the person who paid the most for the cocaine would be responsible for dividing it. He also stated that the appellant was responsible for dividing the cocaine about five to six times. The parties stipulated that if called to testify, Mr. Capps would invoke his rights under the Fifth Amendment,[4] and refuse to answer any questions regarding the use or distribution of illegal drugs.

The military judge determined that the defense had not shown how Mr. Capps would negate the Government's case or support its own case. Under R.C.M. 704(e):

> [T]he decision to grant immunity is a matter within the sole discretion of the appropriate general court-martial convening authority. However, if a defense request to immunize a witness has been denied, the military judge may, upon motion by the defense, grant appropriate relief directing that either an appropriate convening authority grant testimonial immunity to a defense witness or, as to the affected charges and specifications, the proceedings against the accused be abated, upon findings that:
>
> (1) The witness intends to invoke the right against self-incrimination to the extent permitted by law if called to testify; and
>
> (2) The Government has engaged in discriminatory use of immunity to obtain a tactical advantage, or the Government, through its own overreaching, has forced the witness to invoke the privilege against self-incrimination; and

[4] U.S. CONST. amend. V.

(3) The witness' testimony is material, clearly exculpatory, not cumulative, not obtainable from any other source and does more than merely affect the credibility of other witnesses.

All three prongs of R.C.M. 704(e) must be satisfied before a military judge may overrule the decision of the convening authority to deny a request for immunity. *Ivey*, 55 M.J. at 255.

In applying R.C.M. 704(e) to the present case, the military judge found:

> [T]hat Mr. Capps intends to invoke his rights, but there is no evidence that the [G]overnment has engaged in discriminatory use of immunity to a tactical advantage or has forced the witness to invoke. Furthermore, although Mr. Capps may testify to material facts, there is no evidence that his testimony would be clearly exculpatory. The evidence before the court is that Mr. Capps would be able to testify as to the divers wrongful use of cocaine by the accused. Mr. Capps would also be able to testify that [Amn] Lopez and [the appellant] arrived at the hotel with the cocaine that was then used by Mr. Capps and other [A]irmen.

The military judge then discussed R.C.M. 1001(e)(2) and determined that there was insufficient evidence that Mr. Capps's testimony was necessary for the consideration of a matter of substantial significance to the determination of an appropriate sentence in this case. Finding that the defense had not met its burden to compel immunity, the military judge concluded that Mr. Capps would likely invoke his rights as a sentencing witness as well. Accordingly, the military judge denied the defense motion to compel the production of Mr. Capps and to direct the convening authority to grant immunity to Mr. Capps.

We find that the military judge did not abuse his discretion in denying the defense's motion. If Mr. Capps had been compelled to testify under a grant of immunity, his testimony likely would have operated to inculpate rather than exculpate the appellant's use and distribution of cocaine. His testimony also would have been cumulative with AB Lopez's testimony. Further, his testimony would not have served as a matter of significance to the determination of an appropriate sentence.

Additionally, we concur with the military judge that the defense failed to meet both the second and third prongs of R.C.M. 704 (e). The trial defense counsel presented no evidence that the Government engaged in any discriminatory use of immunity to gain a tactical advantage and, as stated above, the defense failed to show Mr. Capps's testimony was clearly exculpatory and not cumulative or obtainable from another source. Accordingly, the military judge did not err in denying the defense motion to compel production of Mr. Capps.

Failure to Abate the Proceedings

The third assignment of error is whether the military judge committed plain error when he did not abate the proceedings when there was no indication that the prosecution forwarded the defense request for immunity of Mr. Capps to the convening authority.

Objections not raised at trial are reviewed for plain error. *United States v. Gladue*, 67 M.J. 311, 313 (C.A.A.F. 2009). To establish plain error, the appellant bears the burden of demonstrating the following: (1) there was error; (2) such error was plain, clear, or obvious; and (3) that the error materially affects substantial rights resulting in prejudice. *United States v. Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005).

In support of his position, the appellant relies on our superior court's decision in *United States v. Ivey*, where the Court found that R.C.M. 704(c)(3) "prohibits delegation of the authority to act on requests for immunity, a trial counsel or Staff Judge Advocate would violate the rule if he or she de facto denied a request for immunity by withholding it from the convening authority." *Ivey*, 55 M.J. at 255.

The appellant alleges that the military judge committed plain error when it was apparent that the immunity request for Mr. Capps was not presented to the convening authority, but instead denied by the trial counsel. This ultimately led to the defense not being afforded the opportunity to interview Mr. Capps to determine if he had any exculpatory or mitigating evidence. The Government argues that if there was error it was not plain or obvious because the issue was not raised by counsel nor addressed at the trial.

We find that if there was error in this case, it was not plain and obvious as both parties proceeded as if the convening authority had denied the request to produce Mr. Capps. Additionally, even if the error were plain and obvious, it was harmless. The defense would not have provided sufficient evidence to show the necessity of Mr. Capps as a witness. Had the convening authority been pressed for a formal response, he most likely would have denied the request and ultimately the issue would have ended up before the military judge to decide. As discussed above on the second assignment of error, Mr. Capps's testimony would not have been clearly exculpatory and, in fact, would have been cumulative with AB Lopez's testimony. Accordingly, the appellant did not suffer any material prejudice as the result of any error in the process of the said immunity request, and we find his third claim without merit.

Sentence Appropriateness

The appellant asserts that his sentence is inappropriately severe, especially since the members gave a longer sentence to confinement than requested by the Government.[5]

In reviewing sentence appropriateness, we "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offense, the appellant's record of service, and all matters contained in the record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United States v. Rangel*, 64 M.J. 678, 686 (A.F. Ct. Crim. App. 2007), *aff'd*, 56 M.J. 310 (C.A.A.F. 2008). We have a great deal of discretion in determining whether a particular sentence is appropriate, but we are not authorized to engage in exercises of clemency. *Id*. Applying these standards to the present case, we do not find the sentence inappropriately severe.

In its pre-sentencing case, the Government called AB Lopez who testified that during the November 2009 to January 2010 timeframe, he witnessed the appellant use cocaine on numerous occasions. They would engage in "binge" using where they would use 20-25 lines of cocaine during a two- to three-day period, then take a break for a couple of days, then resume the binge usage. AB Lopez testified that he saw the appellant use cocaine approximately 10-12 times in the dorms, several times off-base in his vehicle, and at least twice in a hotel. On one specific occasion, they were at a Hyatt Hotel in San Antonio where they purchased approximately $1,000 worth of cocaine and used it almost nonstop over a two-day period.

Having considered the nature and seriousness of the offenses, this particular appellant, his record of service,[6] and all matters contained in the record of trial, we do not find the sentence is inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[7] Article 66(c), UCMJ; *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000).

[5] The Government argued for 18 months of confinement, and the adjudged sentence included 20 months of confinement.

[6] We note that on 16 March 2010, the appellant received nonjudicial punishment under Article 15, UCMJ, 10 U.S.C. § 815, for underage drinking; on 19 August 2010, the suspended portion of his 16 March 201 punishment was vacated; on 25 August 2010, he received a second Article 15, UCMJ, punishment for underage drinking; on 10 September 2010, he received a letter of reprimand for failure to go on four separate occasions; and on 4 November 2010, he received a second letter of reprimand for underage drinking.

Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LAQUITTA J. SMITH
Appellate Paralegal Specialist

[7] Though not raised as an issue on appeal, we note that 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).