UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Technical Sergeant PAUL R. SMITH
United States Air Force

ACM 38157

5 December 2013

Sentence adjudged 28 March 2012 by GCM convened at Joint Base Lewis-McChord, Washington. Military Judge: Martin T. Mitchell.

Approved Sentence: Dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1.

Appellate Counsel for the Appellant: Captain Christopher D. James.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Daniel J. Breen; Major John M. Simms; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

WIEDIE, Judge:

At a general court-martial, the appellant was convicted, in accordance with his pleas, of two specifications of aggravated sexual abuse of a child and two specifications of indecent acts with a child, in violation of Articles 120 and 134, UCMJ, 10 U.S.C. §§ 920, 934. A panel of officer members adjudged a sentence of a dishonorable discharge, confinement for 10 years, forfeiture of all pay and allowances, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant argues: (1) He was retired at the time of his court-martial and, therefore, reduction in rank was not an authorized punishment; (2) Trial counsel's sentencing argument, in which she referred to him as a "molester" and "warped" and told members not to release him into society without a dishonorable discharge, constituted improper argument; and (3) The military judge abused his discretion in advising the members that sex offender treatment was a collateral consequence. We disagree and, for the reasons discussed below, affirm the findings and sentence.

Background

Over the course of approximately six years, the appellant performed various sexual acts on his young daughter, AS. The first incident occurred sometime between October 2004 and July 2006, when the appellant was stationed in Japan. The appellant and his daughter had both fallen asleep in the family's master bedroom while watching a movie. AS woke up to the appellant sliding his hand under her shirt and rubbing her bare breasts. AS pretended to still be asleep while the appellant continued to rub her breasts for approximately 15 minutes. AS was 8 to 10 years old at the time of this incident.

The second incident, which also occurred in Japan, happened while the family was on a squadron sponsored retreat to White Beach on Okinawa sometime between 1 May 2006 and 31 August 2006. After a day at the beach, AS returned to the bungalow/trailer she was sharing with her parents and went to sleep. The appellant and Mrs. LS, the appellant's wife and AS's biological mother, returned sometime later. When Mrs. LS fell asleep, the appellant lifted AS out of her bed and carried her to the bed he was sharing with his wife. As Mrs. LS continued to sleep, the appellant placed AS between himself and his wife. AS had awoken when the appellant moved her but then fell back asleep. She awoke a second time to find the appellant's hand up her shirt, feeling her breasts. While AS pretended to be asleep, the appellant continued to touch her, rubbing her clitoris and penetrating her vagina and anus with his finger. The next morning Mrs. LS became suspicious and asked AS if the appellant had touched her inappropriately. AS responded that he had. Mrs. LS became upset and told AS to tell her if it happened again. At the time of this incident, AS was approximately 10 years old.

Following the appellant's assignment to Joint Base Lewis-McChord, the family moved to the state of Washington. Sometime between 16 January 2008 and 1 February 2010, the appellant inappropriately touched his daughter a third time. While watching television in the living room, the appellant and AS fell asleep on the couch. Once again, AS woke up to feeling the appellant's hand under her shirt, fondling her breasts. As before, AS pretended to be asleep throughout the incident. In between getting up to refresh his drink, the appellant spent approximately 15 to 30 minutes rubbing AS's vagina and clitoris and penetrating her vagina with his finger. AS was 12 to 14 years old at the time of this incident.

The last incident occurred in February 2010 when AS was 14 years old. Two days after the appellant returned from a deployment in Iraq, AS was taking a nap on her bed following church. The appellant entered the room, got into bed with AS, and pulled her body close to his. Once again, AS pretended to be asleep. The appellant proceeded to rub her breasts under her bra as well as slip his hand inside her underwear, touching her vagina, rubbing her clitoris, and penetrating her vagina with his finger.

The day after this fourth incident, AS asked her mother if she could have a lock on her bedroom door. When asked why, AS responded that the appellant had been touching her and she did not want him coming in her room. Upon learning this information, Mrs. LS took AS and went to stay with some neighbors, RL and SL.

Eventually, Mrs. LS told RL what had happened. In time, RL went to AS and confirmed what Mrs. LS had told her. On 24 June 2010, RL contacted Mrs. LS and told her she had 24 hours to report what happened to the police or she would call them herself. The next day, the appellant called RL's husband, SL, and asked him not to report the abuse until after he had retired from the military. That same day, RL reported what she knew to the police. Also that same day, the appellant approached his First Sergeant and asked to expedite his retirement paper work.

Based on his application for retirement, the appellant was issued retirement orders purporting to be effective 1 December 2010. His DD Form 214 was signed on 2 December 2010 and subsequently sent to him. Although it is unclear how long the appellant received retired pay based on the facts presented to this Court, he did receive retired pay at least once. His retirement order was rescinded by a subsequent order dated 15 December 2010.

Between 1 December 2010 and his trial, the appellant received nonjudicial punishment (NJP) under Article 15, UCMJ, 10 U.S.C. § 815, and a letter of reprimand (LOR). The NJP was for being drunk on duty as a "Flight Training Manager" on 2 February 2011. The appellant waived his right to court-martial and accepted the NJP proceedings on 22 February 2011. The appellant received the LOR for being drunk on duty on 22 September 2011.

After the members began deliberating on sentence, one of the members submitted a written question to the court, asking whether the appellant would receive sex offender treatment while in confinement. The military judge advised both sides that he intended to instruct the members that treatment was a collateral matter and not relevant to their determination of an appropriate sentence. Neither side objected to the proposed instruction and the military judge so instructed the members.

During sentencing argument, trial counsel referred to the appellant as a "molester" approximately nine times. Trial counsel also argued that he had a "warped" mentality

and noted he had "a baby son at home." Trial defense counsel objected to trial counsel's description of the appellant and her reference to the appellant's son. The military judge sustained the objection with respect to the reference to the appellant's infant child but overruled the objection pertaining to trial counsel's description of the appellant. Trial counsel also rhetorically asked the members, "How can we release this sex offender into society without a dishonorable discharge?" and argued that the members must characterize the appellant's service with a dishonorable discharge.

Appellant's Status at the Time of Trial

The issue raised by the appellant on this assignment of error is not whether the Air Force had court-martial jurisdiction over him at the time of his trial. As the appellant correctly concedes, retired military members are subject to court-martial jurisdiction. *See* Article 2(a)(4), UCMJ, 10 U.S.C. § 802(a)(4); *Willenbring v. Neurauter*, 48 M.J. 152, 157-58 (C.A.A.F. 1998) (noting "certain statutorily designated categories of military retirees are subject to trial by court-martial, including trial for offenses committed during a prior enlistment, even though they no longer are performing military duties"); *United States v. Sloan*, 35 M.J. 4, 7-8 (C.M.A. 1992); *Pearson v. Bloss*, 28 M.J. 376 (C.M.A. 1989). It is also well-settled in the law that retirees tried by court-martial cannot be reduced in rank. *Sloan*, 35 M.J. at 12 (holding that an appellant tried as a *retired* member as opposed to a member recalled to active duty could not be reduced in rank); *United States v. Allen*, 33 M.J. 209 (C.M.A. 1991). Thus, the threshold question here is whether the appellant was a retiree at the time of his court-martial. The appellant argues to this Court that he was not on active duty at the time of his court-martial because he received a retirement order and retirement pay, but his colloquy with the military judge during the *Care* inquiry[1] and the stipulation of fact[2] he entered into with the

[1] During his *Care* inquiry (*See United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969)), the appellant had the following exchange with the military judge:

> MJ: And when did you first enlist?
> ACC: I enlisted in November of 1987.
> MJ: Have you continuously been on active duty with the United States Air Force from November of 1987 through today?
> ACC: Yes, Your Honor.
> MJ: Have you ever had any breaks in enlistment?
> ACC: No, Your Honor.
> MJ: Have you ever been discharged from the Air Force?
> ACC: No, Your Honor.
> MJ: Have you ever been released from active duty?
> ACC: No, Your Honor.
> MJ: Have you continuously been on active duty with the Air Force since November of 1987 through today?
> ACC: Yes, Your Honor.

[2] The stipulation of fact entered into by the parties states that the appellant ". . . entered active duty on 27 November 1987 *and has been on continuous active duty since that date*." (emphasis added)

Government indicated that he was well aware of his status as an active duty military member. Furthermore, despite the appellant's claims that he was retired effective 1 December 2010, he received NJP under Article 15, UCMJ, for being drunk *on duty* as a "Flight Training Manager" on 2 February 2011 and accepted the NJP ten days later. On 1 November 2011, the appellant received his LOR for being drunk *on duty* on 22 September 2011. At trial, defense counsel submitted a retired pay projection showing the appellant's projected retirement pay at various ranks. We also note two other significant facts contained in the record that indicate the appellant, contrary to his claims now, was unmistakably on active duty at the time of his court-martial. Prosecution Exhibit 2, the Personal Data Sheet (PDS) of the appellant, dated 27 March 2012, was admitted into evidence without objection. The PDS listed the appellant's basic pay as $3,589.80 and his length of service as 24 years and 4 months. We note that the basic pay in 2012 for an E-6 with over 24 years was $3,589.80. The retired pay he would have been entitled to had he actually retired on 1 December 2010 would have been significantly lower. Furthermore, had the appellant truly retired on 1 December 2010, his length of service would have been 23 years. If, on the other hand, the appellant served on active duty, without any break in service, from his initial enlistment until the day of his court-martial his length of service would be 24 years and 4 months, as noted on the PDS. The appellant's argument that he was retired at the time of his court-martial simply belies the facts of this case. There is nothing in the record nor in what was submitted by the appellant on appeal that indicates that he did anything other than go to work as an active duty military member day after day following his purported retirement on 1 December 2010.

A retiree, by definition, is no longer on active duty; retiree and active duty member are mutually exclusive statuses. A military member who retired but is subsequently recalled to active duty is an active duty member, not a retiree. Although the appellant was issued a retirement order and received at least some retired pay, the retirement order was rescinded. This paperwork error did not transform the appellant from an active duty member into a retiree. To the contrary, all evidence is that the appellant acted like, and thought himself to be, an active duty military member. He stipulated to the fact that he had been on continuous active duty since November of 1987. He told the military judge that he had never been released or discharged from active duty. He obviously went to work and performed military duties given the fact that he was twice punished for being drunk on duty during the time he claimed to be a retiree. We find no merit in his argument that he was a retiree at the time of his court-martial and therefore not subject to a reduction in rank as a potential punishment.

Trial Counsel's Sentencing Argument

The appellant argues that trial counsel's sentencing argument unduly inflamed the passions of the court members when she referred to him as "warped" and a "molester." The appellant further contends trial counsel improperly blurred the distinction between a

punitive discharge and an administrative separation during her argument. At trial, the defense objected to trial counsel's use of derogatory names to describe the appellant but did not object to her argument concerning the imposition of a punitive discharge.

Improper argument is a question of law we review de novo. *United States v. Pope*, 69 M.J. 328, 334 (C.A.A.F. 2011) (citing *United States v. Moran*, 65 M.J. 178, 181 (C.A.A.F. 2007)). The standard of appellate review for an improper argument is governed by the content of the argument and whether there was an objection at trial. *United States v. Erickson*, 63 M.J. 504, 509 (A.F. Ct. Crim. App. 2006). "The legal test for improper argument is whether the argument was erroneous and whether it materially prejudiced the substantial rights of the accused." *United States v. Baer*, 53 M.J. 235, 237 (C.A.A.F. 2000). If trial defense counsel fails to object to the complained of portion of the sentencing argument, we review that claim for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007) (citations omitted); Rule for Courts-Martial 1001(g). To prevail when there is no objection at trial, the appellant must prove: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right." *Erickson*, 65 M.J. at 223; *United States v. Powell*, 49 M.J. 460, 463-64 (C.A.A.F. 1998).

"When arguing for what is perceived to be an appropriate sentence, the trial counsel is at liberty to strike hard, but not foul, blows." *Baer*, 53 M.J. at 237 (citations omitted). "[I]t is error for trial counsel to make arguments that 'unduly . . . inflame the passions or prejudices of the court members.'" *United States v. Schroder*, 65 M.J. 49, 58 (C.A.A.F. 2007) (quoting *United States v. Clifton*, 15 M.J. 26, 30 (C.M.A. 1983)).

We will first address trial counsel's references to the appellant as a "molester" and "warped" to determine whether they constituted improper argument and whether they materially prejudiced the substantial rights of the appellant. A molester is someone who molests and to molest is "to make annoying sexual advances to, esp. to force physical and usually sexual contact on." *The Merriam-Webster Dictionary* 465 (2004). Warped is the past tense of warp which, in the context the word was used by trial counsel, refers "to become so twisted; to lead astray; pervert." *Id.* at 818.

We must view the context of the entire court-martial to determine whether or not comments are fair. *United States v. Gilley*, 56 M.J. 113, 121 (C.A.A.F. 2001). The appellant, whether he likes to be characterized as one or not, epitomizes the definition of a molester. He forced physical and sexual contact on his own daughter on four separate occasions. Furthermore, to suggest that sexually assaulting your own minor daughter is done by one who has become twisted and been led astray is certainly no stretch of the facts in this case. While the appellant may not like to hear his conduct described in unfavorable terms, he has no cause to complain when the characterization is accurate. In this case, the appellant's conduct fit the accepted usage of the words utilized by trial counsel. The words used by trial counsel to describe the appellant may have been strong,

but they were supported by the facts. Military courts have approved the use of similar and even harsher words when they were supported by the facts of the particular case. *See United States v. Spence*, NMCM 200100085 (N.M. Ct. Crim. App. 9 May 2003) (unpub. op.) (noting trial counsel "clearly" could properly refer to the appellant as a "thief" and a "liar" given that he had been convicted of intentionally falsifying documents in an attempt to improperly receive government benefits); *United States v. Isla*, ACM 28871 (A.F.C.M.R. 13 November 1991) (unpub. op.) (finding the evidence supported trial counsel's characterization of the appellant as a "pedophile" and a "cancer"); *United States v. McPhaul*, 22 M.J. 808, 814-15 (A.C.M.R. 1986), *petition denied*, 23 M.J. 266 (C.M.A. 1986) (presentencing argument of trial counsel, which referred to defendant as a "miserable human being" and "degenerate scum," was grounded on evidence in the record and reasonable inferences drawn therefrom and was not improper); *United States v. Allison*, NMCM 200000637 (N.M. Ct. Crim. App. 24 November 2004) (unpub. op.) (finding trial counsel's reference to the appellant as "evil and depraved" and as a "sexual predator" struck hard blows, but were not aimed at improperly inflaming the passions of the members when viewed within the context of the entire court-martial).

Next we turn to the appellant's claim that trial counsel's sentencing argument improperly blurred the distinction between a punitive discharge and an administrative separation. Because trial defense counsel failed to object to this portion of the argument, we review for plain error.

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, it is improper to "blur[] the distinction between a punitive discharge and administrative separation." *United States v. Motsinger*, 34 M.J. 255, 257 (C.M.A. 1992). To determine 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.'" *Baer*, 53 M.J. at 238 (quoting *United States v. Young*, 470 U.S. 1, 16 (1985)). The lack of defense objection is at least "some measure of the minimal impact" of the trial counsel's allegedly improper argument. *Gilley*, 56 M.J. at 123 (citations omitted) (internal quotation marks omitted).

Viewing trial counsel's entire argument, we find no error in her brief statement rhetorically asking how the appellant could be released into society without a dishonorable discharge and stating that his service must be characterized with a dishonorable discharge. Trial counsel's overall argument unquestionably concentrated on why a dishonorable discharge was appropriate for this accused. Immediately preceding the statements at issue, trial counsel acknowledged that a dishonorable discharge is a "uniquely military *punishment*" and that it was the label we put on service that has been dishonorable for someone who has brought discredit on the armed forces. (Emphasis added). Interpreting these statements in context, we find that the argument properly

commented on the appropriateness of a dishonorable discharge as punishment and did not suggest that it should be used simply to separate the appellant from the Air Force. Furthermore, the military judge properly instructed the members on punitive discharges and specifically a dishonorable discharge. Court members are presumed to follow the military judge's instructions absent evidence to the contrary. *United States v. Rushatz*, 31 M.J. 450, 456 (C.M.A. 1990). We see no reason to find otherwise in this case. 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.

Exclusion of Evidence Concerning Availability of Treatment Programs in Confinement

Deeply rooted in military case law is the concept that an accused should be sentenced without regard to any collateral administrative consequences of the punishment. *United States v. Murphy*, 26 M.J. 454 (C.M.A. 1988); *United States v. Griffin*, 25 M.J. 423 (C.M.A. 1988), *cert. denied*, 487 U.S. 1206 (1988); *United States v. Quesinberry*, 31 C.M.R. 195, 198 (C.M.A. 1962). Specifically, this Court has previously acknowledged that the availability of treatment programs in confinement is a collateral matter and should not be considered in arriving at an appropriate sentence. *See United States v. Strowd*, ACM 37497 (A.F. Ct. Crim. App. 8 June 2010) (unpub. op.) (finding military judge had issued appropriate curative instruction advising members to disregard evidence concerning availability of treatment in confinement because it was a collateral matter). In *Griffin*, our superior court noted that when a military judge is confronted with questions from court members regarding collateral consequences of particular sentences, the correct response is to reiterate that collateral consequences are not relevant to their consideration of an appropriate sentence. 25 M.J. at 424. Disregarding this approach "would mean that [military judges] would be required to deliver an unending catalogue of administrative information to court members" and our superior court has stated that "the waters of the military sentencing process should [not] be so muddied." *Quesinberry*, 31 C.M.R. at 198.

The availability of sex offender treatment in confinement is a collateral matter. Although the military judge could have answered the court member's question about the availability of such treatment, especially if the defense consented, it certainly was not error to advise the members that such information was a collateral matter and should not be considered in arriving at an appropriate sentence.

The appellant argues that the availability of sex offender treatment while in confinement is not a collateral matter and therefore the military judge abused his discretion by refusing to answer the member's question, in light of our superior court's decision in *United States v. Riley*, 72 M.J. 115 (C.A.A.F. 2013). In *Riley*, the accused was not advised by her trial defense counsel that pleading guilty to kidnapping of a child subjected her to registration as a "sex offender" pursuant to federal law and our superior court held that "in the context of a guilty plea inquiry, sex offender registration

consequences can no longer be deemed a collateral consequence of the plea." 72 M.J. at 121. That language, however, is used in the context of whether the accused understood the "meaning and effect" of her guilty plea, as required by Article 45(a), UCMJ, 10 U.S.C. § 845(a), which includes the consequence of sex offender registration. We find the availability of sex offender treatment in confinement still falls within the category of collateral matters that members should not consider in determining an appropriate sentence.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 66(c), UCMJ, 10 U.S.C. §§ 859(a), 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and sentence are

AFFIRMED.

FOR THE COURT

LEAH M. CALAHAN
Deputy Clerk of the Court