UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MICHAEL J. MARCUS
United States Air Force

ACM 35047

9 July 2003

Sentence adjudged 7 February 2002 by GCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Steven A. Hatfield (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott and Major Jeffrey A. Vires.

Appellate Counsel for the United States: Colonel Anthony P. Dattilo, Lieutenant Colonel Lance B. Sigmon, and Major Lane A. Thurgood.

Before

VAN ORSDOL, STONE, and ORR, V.A.
Appellate Military Judges

OPINION OF THE COURT

ORR, V.A., Judge:

On 7 February 2002, the appellant was tried by a general court-martial composed of a military judge sitting alone at Francis E. (F.E.) Warren Air Force Base (AFB), Wyoming. Consistent with his pleas, he was found guilty of wrongfully disposing of military property, obstructing justice by concealing a stolen weapon, and knowingly receiving a stolen weapon, in violation of Articles 108 and 134, UCMJ, 10 U.S.C. §§ 908, 934. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 6 months, and reduction to E-1. At the appellant's request, the convening authority waived the mandatory forfeitures of all pay and allowances for 6 months or until the appellant's release from confinement, whichever was sooner, and

directed the money to be paid to his spouse for the benefit of his child. Before this Court, the appellant for the first time asserts that the military judge improperly considered aggravation evidence during sentencing.

The appellant was assigned to the 790th Security Forces Squadron at F.E. Warren AFB in Cheyenne, Wyoming. On 29 November 2000, another airman in the squadron asked the appellant if he would hide a nine-millimeter Beretta handgun and four ammunition clips for him at the appellant's home. The appellant knew the airman had stolen the property from the squadron armory and was about to separate from the Air Force. The airman told the appellant that he would return to claim the items, but never did. The appellant stored the handgun and clips in his garage for the next several months. Almost a full year later, in an effort to dispose of the weapon, the appellant disassembled the handgun and threw it into a nearby lake located off the installation.

At trial before a military judge sitting alone, the appellant pled guilty to all the charges and their specifications. The trial counsel called the Security Forces squadron commander during sentencing to testify regarding the impact the missing weapon had on the squadron. The commander told the court that 12 people within the unit had been reassigned and that the senior noncommissioned officer in charge and his assistant had received letters of reprimand because the handgun could not be located. During sentencing, the trial counsel argued:

> My client is also concerned about the impact that it [the theft of the weapon] had on the 790th. Twelve people were fired. Now, this accused didn't steal the weapon, but he played a pretty large part as to the disposition of this weapon. He hid it for almost a year. Due to the fact that they could not find this weapon because this accused was hiding it in his garage, 12 people were fired. A senior NCO received an LOR. That's pretty significant, Your Honor.

The defense counsel did not object to the trial counsel's argument, but rather argued that the squadron's inability to discover the loss for several months was not the appellant's fault.

The appellant's failure to object to this evidence "at the trial level constituted a forfeiture of the objections to admission of such evidence in the absence of plain error." *United States v. Prevatte*, 40 M.J. 396, 397 (C.M.A. 1994) (citations omitted); Mil. R. Evid. 103. To establish plain error, the appellant must show that there was error; that such error was plain, clear, or obvious; and that the error affected appellant's substantial rights. *United States v. Olano*, 507 U.S. 725, 732-34 (1993). The appellant's initial burden of persuasion under a plain error analysis does not shift to the government until he shows that the error was plain or obvious, and that it materially prejudiced a substantial right. *United States v. Carpenter*, 51 M.J. 393, 396 (1999).

During the sentencing phase, trial counsel may present evidence in aggravation "directly relating to or resulting from the offenses of which the accused has been found guilty." Rule for Courts-Martial (R.C.M.) 1001(b)(4). "Whether a circumstance is 'directly related to or results from the offenses' calls for considered judgment by the military judge, and we will not overturn that judgment lightly." *United States v. Wilson*, 47 M.J. 152, 155 (1997). In a court-martial before a military judge alone, we may presume that a military judge knows the law and acts according to it. *United States v. Raya*, 45 M.J. 251, 253 (1996); *Prevatte*, 40 M.J. at 398. Evidence in aggravation may include "evidence of significant adverse impact on the mission, discipline, or efficiency of the command directly and immediately resulting from the accused's offense." R.C.M. 1001(b)(4).

The appellant has failed to meet his burden of persuasion in this case. The military judge did not err when he considered the squadron commander's testimony about the actions she took within the unit after learning about the missing handgun. The squadron commander testified as follows:

> I ended up giving the NCOIC and his assistant letters of reprimand based on the fact we couldn't prove who stole the weapons. It was kind of a vale [sic] of suspicion over everybody. So, I removed all of the armorers out of the armory and replaced all of them.

By taking possession of the stolen weapon and concealing it for nearly a year, the appellant made it significantly more likely that the unit would be unable to determine who took the weapon or which armorer was accountable for its whereabouts. The commander took the only option she believed appropriate, which was to remove anyone who may have had responsibility for the missing weapon. The commander's actions were a sufficiently direct and immediate result of his offenses to be admissible as evidence in aggravation. *See United States v. Key*, 55 M.J. 537, 539 (A.F. Ct. Crim. App. 2001), *aff'd*, 57 M.J. 246 (2002) and cases cited therein.

We are convinced the military judge did not consider this evidence improperly, and in the absence of evidence to the contrary, we conclude that the military judge gave appropriate weight to the commander's testimony. The adjudged sentence of a bad-conduct discharge, confinement for 6 months, and reduction to E-1 without any forfeitures further confirms that the military judge understood the law and applied it properly in the appellant's case.

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, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37,41 (2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator