

UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before
JOHNSON, KRAUSS, and BURTON
Appellate Military Judges

UNITED STATES, Appellee
v.
Private First Class MARK S. BLUE, JR.
United States Army, Appellant

ARMY 20110323

Headquarters, Fort Drum
Andrew Glass, Military Judge (arraignment)
John V. Imhof, Military Judge (trial)
Major Joseph A. Fedorko, Acting Staff Judge Advocate (pretrial)
Lieutenant Colonel Olga M. Anderson, Staff Judge Advocate (post-trial)

For Appellant: Lieutenant Colonel Peter Kageleiry, Jr., JA; Major Jacob D. Bashore, JA.

For Appellee: Pursuant to A.C.C.A. Rule 15.2, no response filed.

30 August 2012

MEMORANDUM OPINION

This opinion is issued as an unpublished opinion and, as such, does not serve as precedent.

JOHNSON, Judge:

A military judge, sitting as a special court-martial, convicted appellant, consistent with his pleas, of absence without leave and wrongful use of marijuana, in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 912a (2006) [hereinafter UCMJ]. The military judge sentenced appellant to a bad-conduct discharge, confinement for five months, forfeiture of \$978.00 per month for five months, and reduction to the grade of E-1. The convening authority approved the adjudged sentence.

Although not raised by appellate defense counsel, we find First Sergeant (1SG) EC's testimony during the sentencing proceeding at appellant's court-martial

to be improper. However, under the circumstances of this case, we do not believe this error materially prejudiced the substantial rights of appellant. UCMJ art. 59(a).

FACTS

The government called one witness during the sentencing proceeding at appellant's court-martial: 1SG EC. First Sergeant EC had served in the Army for twenty-one years at the time of appellant's court-martial. First Sergeant EC estimated that he had supervised "around 1,000" soldiers during his career. After eliciting this background information, the trial counsel asked 1SG EC what made a "good soldier." Conversely, the trial counsel then asked 1SG EC what made a "bad soldier."

Immediately after asking 1SG EC what made a "bad soldier," the trial counsel asked 1SG EC how he personally felt about drug use and those soldiers who used drugs. First Sergeant EC responded that drugs were a "no-go," and that drug use could not be tolerated in the aviation world. After discussing drug use, the trial counsel next transitioned to what 1SG EC personally thought about soldiers who absented themselves from their unit. First Sergeant EC responded that, in his personal opinion, being absent from one's unit was "another one of those you can't deal with."

At this point, the trial counsel had 1SG EC confirm that he knew appellant and had 1SG EC identify appellant for the record. After discussing the administrative burdens associated with reintegrating appellant back into the unit, the trial counsel asked 1SG EC what he thought should happen to appellant as a result of the offenses to which he pled guilty. Appellant's defense counsel objected, and after the military judge agreed with the objection, the military judge asked the trial counsel to "reword" his question. In response, the trial counsel asked 1SG EC what place there was for soldiers who used marijuana. First Sergeant EC responded that there was no place in the Army for marijuana users.

On cross-examination, 1SG EC rated appellant as one of the hardest workers in the unit. In fact, 1SG EC testified that appellant was an "outstanding" worker, who "did everything he was asked and beyond." Ultimately, 1SG EC testified that appellant was an asset to the unit.

On redirect, the trial counsel, as his sole question, again asked 1SG EC if there was a place in the Army for soldiers who used marijuana. First Sergeant EC again responded that there was no place for such a soldier. After hearing this exchange, the military judge asked 1SG EC the following question: "[a]re you saying you do not know [s]oldiers that can stay in the Army after a single use of marijuana?" First Sergeant EC stated that any type of drug use was a "no-go" in the aviation world because lives would potentially be in danger. The trial counsel

subsequently asked the military judge if 1SG EC could “elaborate” on his response to the military judge’s question. The military judge permitted 1SG EC to elaborate on his previous response. First Sergeant EC added that even though appellant was a motor transport operator, he was “one of us” and expected to do the right thing all of the time to ensure that soldiers were transported safely to and from their destinations.

During his sentencing argument, the trial counsel asked the military judge to adjudge a bad-conduct discharge, confinement for eight months, forfeiture of two-thirds pay for eight months, and reduction to the grade of E-1. To justify this sentence, the trial counsel referred in part to 1SG EC’s testimony. The military judge made no comment on the evidence or arguments prior to announcing his sentence.

LAW

This case is before us for review under Article 66, UCMJ, which provides that a Court of Criminal Appeals “may affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact.”

“A military judge’s decisions to admit or exclude evidence are reviewed for an abuse of discretion.” *United States v. Eslinger*, 70 M.J. 193, 197 (C.A.A.F. 2011) (citing *United States v. Ediger*, 68 M.J. 243, 248 (C.A.A.F. 2010)). “Failure to object to the admission of evidence at trial forfeits appellate review of the issue absent plain error.” *Id.* at 197–98 (citations omitted). “To establish plain error, appellant must demonstrate that: (1) there was error, (2) the error was plain, clear, or obvious, and (3) the error materially prejudiced one of his substantial rights.” *United States v. Fisher*, 67 M.J. 617, 620 (Army Ct. Crim. App. 2009) (citations omitted). Whether we consider these errors under the abuse of discretion standard or plain error, we test the erroneous admission or exclusion of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence. *Eslinger*, 70 M.J. at 201 (assuming that the testimony of COL Tovo, MAJ Peltier, and MSG Stensgaard constituted plain and obvious error, it “did not substantially influence the members’ judgment on the sentence.”); *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005) (stating that “[w]e test the erroneous admission . . . of evidence during the sentencing portion of a court-martial to determine if the error substantially influenced the adjudged sentence.”) (citations omitted).

Rule for Courts-Martial [hereinafter R.C.M.] 1001(b)(5)(A) permits the government to offer evidence of an accused’s rehabilitative potential. However, R.C.M. 1001(b)(5)(C) and R.C.M. 1001(b)(5)(D) place limitations on what the opinion can be based upon and how it can be conveyed. First, R.C.M. 1001(b)(5)(C) states that the opinion “regarding the severity or nature of the accused’s offense or

offenses may not serve as the principal basis for an opinion of the accused's rehabilitative potential." Second, R.C.M. 1001(b)(5)(D) provides that "[a] witness may not offer an opinion regarding the appropriateness of a punitive discharge or whether the accused should be returned to the accused's unit." *See also* R.C.M. 1001(b)(5)(D) discussion (stating that "[t]he witness . . . generally may not further elaborate on the accused's rehabilitative potential, such as describing the particular reasons for forming the opinion.").

DISCUSSION

First Sergeant EC's testimony ran afoul of both of the limitations contained in R.C.M. 1001(b)(5)(C) and R.C.M. 1001(b)(5)(D). First, 1SG EC never specifically stated what he thought about appellant's rehabilitative potential. Instead, 1SG EC simply stated what he personally thought about the severity and nature of the offenses to which appellant pled guilty. Such testimony is simply not helpful to the sentencing authority and constituted plain and obvious error. *See United States v. Horner*, 22 M.J. 294, 296 (C.M.A. 1986) (recognizing "[i]t would be ironic and absurd if R.C.M. 1001(b)(5) were construed to allow the parties to call witnesses simply for the purposes of telling the court-martial what offenses, in the witnesses' estimation, require punitive discharges or lengthy confinement, etc."). The sentence in any given case must be reserved to the sentencing authority only and "cannot be usurped by a witness." *United States v. Ohrt*, 28 M.J. 301, 305 (C.M.A. 1989).

Second, 1SG EC's personal opinions violated the "euphemism" rule, which prohibits government witnesses from explicitly or implicitly testifying that an accused should be punitively discharged. *See Ohrt*, 28 M.J. at 305. Rule for Courts-Martial 1001(b)(5)(D) "contemplates one question: '[w]hat is the accused's potential for rehabilitation?' – and one answer: '[i]n my opinion, the accused has _____ [good, no, some, little, great, zero, much, etc.] potential for rehabilitation.'" *United States v. Aurich*, 31 M.J. 95, 96 (C.M.A. 1990). *See also United States v. Cherry*, 31 M.J. 1, 5 (C.M.A. 1990) (recognizing the euphemism rule prevents commanders from impliedly advocating for separation because such opinions invade the province of the court-martial and could constitute unlawful command influence).

A military judge is presumed to know the law, apply it correctly, and filter out inadmissible evidence when fashioning a sentence. *Fisher*, 67 M.J. at 622. Once again, we stress that while there is no requirement for a military judge to note that he or she did not consider improper evidence or arguments, "a transparent statement by the military judge that he is not considering improper evidence or argument forcefully moots any potential issues and . . . further increases the perception of fairness in the military justice system." *Id.* at 623 n.5.

We are troubled by the fact that not only did the military judge permit questions outside of the confines of R.C.M. 1001(b)(5), he actually asked impermissible questions himself. The military judge’s questioning of 1SG EC, along with the questions he allowed the trial counsel to ask, far exceeded the strict bounds of R.C.M. 1001(b)(5)(D), and stand in contrast to his initial agreement with defense counsel that this testimony was objectionable.

We have reservations about the military judge’s application of the law and his ability to filter out inadmissible evidence based upon the totality of the entire record. We cannot say with confidence that the military judge properly considered evidence in aggravation.

Nonetheless, we ultimately conclude that 1SG EC’s improper testimony did not prejudice appellant. Recognizing the offenses to which appellant pled guilty, properly considering the evidence in extenuation and mitigation as well as in aggravation, and acknowledging the jurisdictional limit of the court–martial at hand, we are confident that 1SG EC’s erroneous testimony did not substantially influence the adjudged sentence in this case. *See Eslinger*, 70 M.J. at 201 (finding no prejudice because “the possibility [a]ppellant would have received less confinement or would have avoided a punitive discharge, absent the rebuttal testimony, was remote.”); *Griggs*, 61 M.J. at 410.

CONCLUSION

On consideration of the entire record, the findings of guilty and the sentence are AFFIRMED.

Judge KRAUSS and Judge BURTON concur.



FOR THE COURT:

A handwritten signature in black ink, appearing to read "Joanne P. Tetreault Eldridge".

JOANNE P. TETREAULT ELDRIDGE
Deputy Clerk of Court