

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
B.L. PAYTON-O'BRIEN, J.A. MAKSYM, R.Q. WARD
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**ANDREW C. SHERMAN
ENGINEMAN FIREMAN APPRENTICE (E-2), U.S. NAVY**

**NMCCA 201200031
GENERAL COURT-MARTIAL**

Sentence Adjudged: 12 October 2011.

Military Judge: CAPT Kevin O'Neil, JAGC, USN.

Convening Authority: Commander, Navy Region Southwest, San Diego, CA.

Staff Judge Advocate's Recommendation: LT L.E. Whitehead, JAGC, USN.

For Appellant: LT Gregory Morison, JAGC, USN.

For Appellee: Capt Crista Kraics, USMC.

21 June 2012

OPINION OF THE COURT

THIS OPINION DOES NOT SERVE AS BINDING PRECEDENT, BUT MAY BE CITED AS PERSUASIVE AUTHORITY UNDER NMCCA RULE OF PRACTICE AND PROCEDURE 18.2.

WARD, Judge:

A military judge sitting as a general court-martial convicted the appellant, pursuant to his pleas, of one specification each of unauthorized absence, violating a lawful general order, manufacture of marijuana with intent to distribute, distributing marijuana, and wrongful use of marijuana, in violation of Articles 86, 92, and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886, 892, and 912a,

respectively. The military judge sentenced the appellant to 28 months confinement, reduction to pay grade E-1, and a dishonorable discharge from the U.S. Navy. The convening authority approved the sentence as adjudged and, pursuant to a pretrial agreement, suspended all confinement in excess of 18 months for the period of confinement served plus 12 months.

The appellant raises three assignments of error: first, that the military judge erred in allowing the Government to introduce improper evidence in aggravation; second, that the sentence of a dishonorable discharge is inappropriately severe; and third, that the court-martial lacked personal jurisdiction over the appellant at the time of trial.

We have examined the record of trial, the appellant's assignments of error, and the pleadings of the parties. We conclude that the findings and the sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Background

The appellant, an engineman fireman apprentice with over four years of service, began a period of unauthorized absence on 24 February 2011 when he left his ship while on restriction. Charge Sheet; Record at 33-34. On 9 May 2011, deputies from the U.S. Marshal's Office arrested the appellant at his off-base residence in Chula Vista, California. Prosecution Exhibit 24 at 3; Record at 36-37. While placing him under arrest, the deputies noticed a marijuana growing operation inside the house and notified the Naval Criminal Investigative Service (NCIS). PE 24 at 3. Two days later, NCIS agents executed a civilian search warrant on the appellant's house and seized numerous marijuana plants, growing equipment and smoking devices. *Id.*

During the providence inquiry at trial, the appellant explained to the military judge that he, along with his roommate, "J", set up the indoor grow operation in their house. Record at 40-45. He further explained that his purpose in growing marijuana was to provide it to his brother and mother, both of whom had prescriptions for medicinal marijuana due to chronic pain conditions. *Id.* at 46-49. He also admitted to distributing marijuana to his mother and brother, and to his wife "M", and roommate "J", who likewise had prescriptions for medicinal marijuana. *Id.* at 48-49; PE 24 at 4-5.

When it came time for the Government to present evidence in aggravation, the trial counsel called Special Agent (SA) Soriano from NCIS. SA Soriano testified on what he observed in the appellant's residence and his interview of the appellant. Record at 81-125. When the trial counsel asked SA Soriano's opinion on the scope and level of sophistication of the appellant's grow operation, trial defense counsel objected for lack of relevance, cumulativeness, and that the testimony was unfairly prejudicial under MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). Record at 90, 94, 105-06, 110, 112-13, 115, 117, 119-20. Trial counsel also introduced various photographs SA Soriano seized from the appellant's iPhone, including photos of the appellant and his wife "M" posing with marijuana, marijuana smoking devices, or large sums of cash displayed. PE 12-21. When the trial defense counsel objected to some of these photos as not relevant or unfairly prejudicial, the military judge commented "[t]here's limited weight to this [trial counsel] but the court considers it evidence in aggravation that the accused's manufacture was something other than for personal 'medicinal'--and I use that word in quotes in the way that the state of California uses it--purposes. Objections are overruled." Record at 115.

Improper Aggravation

The gist of the appellant's argument is that the military judge improperly admitted much of SA Soriano's testimony and related exhibits, and further, that the military judge failed to properly conduct a MIL. R. EVID. 403 balancing test. Appellant's Brief of 21 Mar 2012 at 15-21. He argues that SA Soriano's testimony and related exhibits went far beyond anything related to "the facts elicited during the providence inquiry." *Id.* at 16. Much of SA Soriano's testimony focused on the size and level of sophistication evident in the appellant's marijuana growing operation. Quite clearly, the trial counsel attempted to paint a different picture than that characterized by the appellant during his providence inquiry.

We review a military judge's decision to admit evidence in aggravation under RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009). Even if proper aggravation, the evidence still must be subjected to the balancing test under MIL. R. EVID. 403. *Id.* If the military judge conducts such a balancing test, we will not disturb that ruling absent a clear abuse of discretion. *Id.* However, where the military judge fails to conduct a proper balancing test, we

grant less deference. *United States v. Stephens*, 67 M.J. 233, 235 (C.A.A.F. 2009).

To be a proper matter in aggravation, evidence of uncharged misconduct must be directly linked to the offense(s) for which the accused stands convicted and be "closely related in time, type, and/or often outcome, to the convicted crime". *United States v. Hardison*, 64 M.J. 279, 281-82 (C.A.A.F. 2007). This poses a higher burden than mere relevance. *Id.* at 281. Even so, we must afford trial judges broad discretion in determining whether aggravation evidence is directly related to or resulting from an offense, a determination that "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 (C.A.A.F. 1997).

We find that SA Soriano's testimony and related exhibits are "directly related" under R.C.M. 1001(b)(4) to the crimes for which the appellant was convicted, as they illustrate the true extent and nature of the appellant's crimes. See *United States v. Gargaro*, 45 M.J. 99, 101 (C.A.A.F. 1996). Although the appellant testified that his efforts were solely to provide medicinal marijuana for his brother and mother, the Government's evidence suggests a far more robust endeavor.¹ We also note that this evidence was closely linked in time to the appellant's crimes as it was seized shortly after the appellant's arrest. Additionally, it was closely linked in type—it all related to the use, possession or manufacture of marijuana. Last, it was closely linked to outcome, for it showed the fruits of his enterprise and his cavalier, even brash embrace of his crimes. See *United States v. Gogas*, 58 M.J. 96, 99 (C.A.A.F. 2003) (selfish indifference to the nature or consequences of the appellant's crime was a proper matter in aggravation).

¹ SA Soriano testified that the grow operation in the appellant's residence was "pretty sophisticated" with 27 marijuana plants inside of an indoor greenhouse that he estimated measured 10'x10'x8'. Record at 84-87, 104. Trial counsel also offered Prosecution Exhibits 1-11 and 22 through SA Soriano, all of which were photos and/or video recordings taken by SA Soriano during his search of the appellant's residence. Based on the evidence he observed within the appellant's residence, SA Soriano estimated the potential output to be 27 pounds of marijuana every twelve weeks with an estimated worth of \$3,500.00 per pound. Record at 93-94. We do not agree with the appellant's argument that aggravation evidence is limited to his own characterization of his crimes as one of the goals in allowing such evidence is to provide "accuracy in the sentencing process." *United States v. Terlap*, 57 M.J. 344, 350 (C.A.A.F. 2002).

Moreover, even though the Government offered it during its case in aggravation, this evidence also rebutted the testimony from the appellant's mother and brother during the defense case in extenuation and mitigation.² Thus we find that this evidence is relevant both in aggravation under R.C.M. 1001(b) (4) and in rebuttal under R.C.M. 1001(d). See *United States v. Eslinger*, 70 M.J. 193, 198 (C.A.A.F. 2011) ("where a party opens the door, principles of fairness warrant the opportunity for the opposing party to respond, provided the response is fair and is predicated on a proper testimonial foundation.")

We note that in several instances where he overruled trial defense counsel's objections, the military judge did not fully articulate the balancing test under MIL. R. EVID. 403. Even with the less deference given in such circumstances, we agree with the military judge that the probative value of this evidence was not substantially outweighed by the danger of any unfair prejudice. *Stephens*, 67 M.J. at 235. While this evidence was certainly prejudicial, we do not find it was unfairly prejudicial. Aggravation evidence by its very nature is prejudicial. *Ashby*, 68 M.J. at 120-21. Because we find it provided a fuller portrayal of the appellant's motivation and the extent of his crimes, we conclude that any resultant prejudice did not substantially outweigh the probative value and therefore the military judge did not abuse his discretion.

Sentence Appropriateness

In his next assignment of error, the appellant argues that a dishonorable discharge is inappropriately severe and resulted from the trial counsel's argument that was based on improper evidence in aggravation. He argues that the dishonorable discharge "punishes Appellant for consequences of drug manufacture and distribution that trial counsel argued resulted from Appellant's misconduct, even though the record does not support that argument." Appellant's Brief at 22. Improper argument by the trial counsel is a question of law we review *de*

² Both the appellant's mother and brother testified that they, in addition to the appellant's wife and roommate, all had "Prop 215" cards which authorized them to use medicinal marijuana under California law and that the appellant's purpose in growing marijuana was to provide them all with a safer alternative than marijuana sold through local dispensaries. Record at 157-63, 167, 173-78, 180; Defense Exhibit A. However, the photographs taken by SA Soriano within the appellant's residence, along with the photos and text messages recovered from the appellant's iPhone, reveal a much broader enterprise and design. A reasonable inference is that the appellant was embarking on a far more ambitious drug manufacture and distribution operation.

novo. United States v. Pope, 69 M.J. 328, 334 (C.A.A.F. 2011). Since there was no objection made during the trial counsel's argument, we review for plain error. *United States v. Erickson*, 65 M.J. 221, 223 (C.A.A.F. 2007).

Since we find no error in the admission of this evidence, we resolve this alleged error against the appellant. However, even if we assumed plain and obvious error, we find no material prejudice to a substantial right of the appellant. This was a military judge alone trial. The fact that the military judge awarded a sentence of twenty-eight months confinement, far less than the maximum authorized militates against any prejudicial impact. Consequently, we conclude that even if this evidence was improperly admitted, viewed in context of the entire court-martial, it did not materially prejudice the substantial rights of the appellant.

We next turn to our duty under Article 66(c), UCMJ, to independently review the sentence of each case within our jurisdiction and only approve that part of a sentence which we find should be approved. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). This obligation requires us to analyze the record as a whole to ensure that justice is done and that the accused receives the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). In making this important assessment, we consider the nature and seriousness of the offenses, as well as the character of the offender, *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982), keeping in mind that courts of criminal appeals are tasked with determining sentence appropriateness, as opposed to bestowing clemency, which is the prerogative of the convening authority, *United States v. Mazer*, 58 M.J. 691, 701 (N.M.Ct.Crim.App. 2003), *set aside and remanded on other grounds*, 60 M.J. 344 (C.A.A.F. 2004).

The appellant pleaded guilty to a host of drug-related offenses, which carried a maximum confinement penalty of 35 years. He engaged in a sophisticated marijuana growing enterprise, which could have resulted in a significant yield both in size and in street value. While he insisted that his efforts were solely to provide medicinal comfort to his family members, there is ample circumstantial evidence to the contrary. Under the facts of this case, we conclude that the appellant's sentence was fair and just. *Baier*, 60 M.J. at 384.

In Personam Jurisdiction

In his final assignment of error, the appellant argues that "[i]n its current state, the record does not conclusively establish that Appellant was still on active duty at the time of his court-martial." Appellant's Reply Brief of 25 Apr 2012 at 7. In support, he cites to a pen and ink change to the term of service listed on the charge sheet and several exchanges during trial where the military judge questioned the appellant about his term of service. He urges this court to remand his case for additional fact-finding or, in the alternative, to order the Government to produce evidence that the appellant was properly placed on legal hold prior to the expiration of his term of service. *Id.*

We review questions of personal jurisdiction *de novo*. *United States v. Fry*, 70 M.J. 465, 470 (C.A.A.F. 2012). A service member becomes subject to court-martial jurisdiction upon enlistment and jurisdiction attaches once action with a view to trial of that person is taken. R.C.M. 202(c)(1). Actions with a view to trial include pretrial restraint and preferral of charges. R.C.M. 202(c)(2); *see also United States v. Wilson*, 53 M.J. 327, 330 (C.A.A.F. 2000). Once it attaches, jurisdiction continues "for all purposes of trial, sentence, and punishment, notwithstanding the expiration of that person's term of service." R.C.M. 202(c); *see also United States v. Harmon*, 63 M.J. 98, 101 (C.A.A.F. 2006). However, jurisdiction terminates once a valid discharge is executed. R.C.M. 202(a), Discussion; *see also United States v. Hart*, 66 M.J. 273, 275 (C.A.A.F. 2008). To be considered valid, a discharge must include: 1) delivery of a valid discharge certificate; 2) a final accounting of pay; and 3) completion of the "clearing" process required under appropriate service regulations for separation. *United States v. Watson*, 69 M.J. 415, 417 (C.A.A.F. 2011). Thus, it is immaterial whether the service member reaches his or her expiration of service if court-martial jurisdiction has attached and the service member has not been validly discharged.

The appellant focuses his argument on whether his current term of service expired prior to trial. Even though the charge sheet initially listed a term of service that expired prior to trial, it is undisputed that the appellant was ordered into pretrial confinement and charges were preferred prior to the expiration of his term of service.³ We note that the appellant

³ The appellant's initial date and term of service as originally listed in block 6 of the charge sheet were 31 July 2007 and four years, respectively.

was unsure when asked by the military judge about his current term of service and pay status, but no less than three times he unequivocally stated that he had not been discharged nor released from active duty. Record at 29-31. Our review of the record reveals nothing to the contrary.⁴ Consequently, even if the appellant's term of service had expired by the time of trial, we find no evidence in the record of a valid discharge and therefore resolve this assignment of error against the appellant.

Conclusion

The findings and sentence as approved by the convening authority are affirmed.

Senior Judge PAYTON-O'BRIEN and Senior Judge MAKSYM concur.

For the Court

R.H. TROIDL
Clerk of Court

As indicated on the charge sheet, he was placed in pretrial confinement on 16 May 2011 and charges were preferred on 27 May 2011, well before any potential expiration of service.

⁴ In PE 24, the appellant stipulates that his initial term of service of 4 years was extended for 24 months, making his end of active duty obligated service date (EAOS) 31 July 2013. PE 27 is the Personal Data Sheet which similarly lists a current term of service of four years with a two year extension. Last, on the day of trial the trial counsel made a pen and ink change to block 6 reflecting a two year extension. When the military judge reviewed this change with counsel, both sides agreed that the appellant's current term of service included a two year extension. Record at 79-80.