

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

**Before
C.L. REISMEIER, J.K. CARBERRY, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**SERGIO GUTIERREZ
CORPORAL (E-4), U.S. MARINE CORPS**

**NMCCA 201100009
SPECIAL COURT-MARTIAL**

Sentence Adjudged: 14 October 2010.

Military Judge: LtCol Thomas Sanzi, USMC.

Convening Authority: Commanding Officer, 1st Marine Special
Operations Battalion, Camp Pendleton, CA.

Staff Judge Advocate's Recommendation: LtCol C.B. Walters,
USMC.

For Appellant: Maj Richard Belliss, USMCR.

For Appellee: CDR Kimberly D. Hinson, JAGC, USN; Capt Mark
V. Balfantz, USMC.

30 August 2011

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.**

PER CURIAM:

A special court-martial, composed of a military judge alone, convicted the appellant, consistent with his pleas of guilt, of one specification of unauthorized absence terminated by apprehension and two specifications of wrongful use of methamphetamines in violation of Articles 86 and 112a, Uniform Code of Military Justice, 10 U.S.C. §§ 886 and 912a. The

appellant was sentenced to confinement for 77 days, forfeiture of \$900.00 pay per month for a period of two months, reduction to pay grade E-1, and a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant assigns a single of error alleging that the military judge committed plain error by allowing presentencing testimony about two instances of misconduct he argues were not directly related to or resulting from the crimes for which he was convicted. We have carefully considered the record of trial and the parties' pleadings. We hold that any error did not materially prejudice the substantial rights of the appellant, and conclude that the sentence and findings are correct in law and fact. Arts. 59(a) and 66(c), UCMJ.

Background

Around 16 April 2010, the appellant used methamphetamine. On 16 April 2010 the appellant was in an unauthorized absence status for a few hours. When asked to provide a urine sample upon his return from UA status later that day, the appellant tampered with the urine bottle by trying to put dirt in the bottom of it, and was required to provide another sample. Record at 53. He was charged neither for his absence on 16 April 2010 nor for his attempted tampering. Instead, his command put him in a substance abuse treatment program for two hours a day, three days a week, for thirteen weeks. *Id.* at 55. The appellant stopped attending the program and went into an unauthorized absence for approximately 50 days from 9 June 2010 until he was apprehended 29 July 2010. At that point, he tested positive for methamphetamine.

During the trial counsel's direct examination of the appellant's immediate supervisor, Gunnery Sergeant (GySgt) S, the witness testified on the two uncharged specifications of misconduct. *Id.* at 53. Defense counsel did not object to the GySgt's testimony regarding appellant's unauthorized absence on 16 April 2010 and appellant's tampering with the urine bottle. Trial counsel repeated that the appellant had tampered with his bottle during closing argument (*id.* at 67) but focused primarily on the long unexcused absence and the drug use. The pretrial agreement's sole protection was a cap on confinement to the 77 days he had already served.

Discussion

The appellant argues that the military judge committed plain error when he allowed presentencing testimony of uncharged

misconduct in violation of RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS MARTIAL, UNITED STATES (2008 ed.). He argues that the testimony concerning his unauthorized absence on 16 April 2010 and subsequent tampering with the urinalysis bottle did not "directly" result from or relate to his two drug offenses and longer unexcused absence, and therefore did not constitute proper evidence in aggravation under R.C.M. 1001(b)(4). The Government responds that there was no plain error and, even if there was error, there was no prejudice to the appellant's fundamental rights.

Where, as here, no objection is raised at trial, an appellant can only prevail on appeal if he can show plain error. MILITARY RULE OF EVIDENCE 103, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.); see *United States v Maynard*, 66 M.J. 242, 244 (C.A.A.F. 2008); *United States v Powell*, 49 M.J. 460, 463-65 (C.A.A.F. 1998). To establish plain error, the appellant must demonstrate: (1) that there was error, (2) that the error was plain or obvious, and (3) that the error materially prejudiced one of his substantial rights. *United States v. Bungert*, 62 M.J. 346, 348 (C.A.A.F. 2006)(citing *United States v Fletcher*, 62 M.J. 175, 179 (C.A.A.F. 2005)). The appellant has the burden of persuading the court that the three prongs of the plain error test are satisfied. *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F.2005).

As all three prongs must be satisfied in order to find plain error, the failure to establish any one of the prongs is fatal to a plain error claim. *Bungert*, 62 M.J. at 348. Here, we need not decide whether there was error or whether any error was plain or obvious, as even if these two prongs were satisfied, the appellant has failed to establish any material prejudice to his substantial rights. *Id.*; see Art. 59(a), UCMJ ("A finding or sentence of court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused"); see also *United States v. Olano*, 507 U.S. 725 (1993)(Supreme Court assumed without deciding the existence of the first two prongs of the plain error analysis and went directly to the prejudice prong).

We must determine whether the alleged error "substantially influenced the adjudged sentence." *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005). In doing so, we consider: 1) the probative value and weight of the evidence; 2) the importance of the evidence in light of other sentencing considerations; 3) the danger of unfair prejudice resulting from the evidentiary ruling; and 4) the sentence actually imposed, compared to the

maximum and to the sentence argued for by the trial counsel. *United States v. Edwards*, 65 M.J. 622, 626 (N.M.Ct.Crim.App. 2007).

In this case, we find that the probative value was moderate, given that it provides a more comprehensive picture of the state of mind of the appellant, and of his behavior at the time he committed the first drug offense. See *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982). In light of other sentencing considerations—such as (a) the appellant's charged unauthorized absence, which was 50 days instead of a few hours, and which terminated by apprehension instead of voluntarily coming in to work, and (b) his two methamphetamine uses—the testimony of the relatively minor offenses was much less important.

Unlike *Griggs*, the danger of unfair prejudice resulting from the testimony was ameliorated by the fact that the case was tried by a judge alone instead of by members, minimizing the danger of prejudice. *United States v Hardison* 64 M.J. 279, 284 (C.A.A.F. 2007); *Bungert* 62 M.J. at 348. Additionally, the testimony was given briefly, and trial counsel made only brief mention of it during argument for sentence. Record at 67. In light of the misconduct and the evidence properly before the court, we are confident that the limited value of a short-term unauthorized absence and an attempt to cover misconduct had no impact, particularly where the drug related misconduct was repeated some three months later.

Considering all of these factors, we conclude that the appellant was not prejudiced by the military's judge's evidentiary rulings and that any errors did not substantially influence the adjudged sentence. *Griggs*, 61 M.J. at 410 (citing *United States v. Boyd*, 55 M.J. 217, 221 (C.A.A.F. 2001)).

Conclusion

The findings and the approved sentence are affirmed.

For the Court

R.H. TROIDL
Clerk of Court