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United States Navy - Marine Corps
Court of Criminal Appeals

Before
KING, TANG, and LAWRENCE,
Appellate Military Judges

UNITED STATES
Appellee

v.

Logan T. BORGELT
Corporal (E-4), U.S. Marine Corps
Appellant

No. 201800212

Decided: 31 December 2019.

Appeal from the United States Navy-Marine Corps Trial Judiciary. Military Judge: Colonel Matthew J. Kent, USMC (Arraignment) Lieutenant Colonel Jeffrey V. Munoz, USMC (Trial). Sentence adjudged 4 May 2018 by a general court-martial convened at Marine Corps Base Camp Pendleton, California, consisting of a military judge sitting alone. Sentence approved by the convening authority: reduction to pay-grade E-1, confinement for thirty-six months, and a bad-conduct discharge.¹

For Appellant: Captain K. Hinson, JAGC, USN.

For Appellee: Lieutenant Commander T. Ceder, JAGC, USN.

¹ In accordance with the pretrial agreement, the convening authority suspended confinement in excess of 12 months.

**This opinion does not serve as binding precedent, but
may be cited as persuasive authority under
NMCCA Rule of Appellate Procedures.**

PER CURIAM

A military judge sitting as a general court-martial convicted Appellant, pursuant to his pleas, of one specification of reckless operation of a vehicle, four specifications of wrongful possession of a controlled substance, two specifications of wrongful use of a controlled substance, and two specifications of wrongful introduction of a controlled substance onto a military installation, in violation of Articles 111 and 112a, Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 911, 912a (2016).

Appellant now asserts four assignments of error: (1) the military judge abused his discretion when he admitted documents during the sentencing hearing over defense objection; (2) the military judge committed plain error when he admitted documents during the sentencing hearing despite no objection from the Defense; (3) Appellant's defense counsel was ineffective; and, (4) relief is warranted under the doctrine of cumulative error. We find no prejudicial error and affirm.

I. BACKGROUND

Appellant admitted that he possessed marijuana, lysergic acid diethylamide (LSD), methamphetamine, and methylenedioxymethamphetamine (MDMA) in his home in family housing on Marine Corps Base Camp Pendleton. He also admitted to using marijuana and methamphetamine and to introducing marijuana and LSD on to that installation. Finally, Appellant admitted to driving a fellow Marine's car in a reckless manner while under the influence of these drugs. Appellant entered into a pretrial agreement with the convening authority wherein he agreed to enter pleas as stated above in exchange for the convening authority's agreement to suspend any adjudged confinement in excess of twelve months.

During his *Care*² inquiry, Appellant informed the military judge that he had possessed drugs "only" in his home. However, Appellant's defense counsel

² *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969).

requested that the military judge inquire into additional facts that indicated Appellant had possessed drugs in his car and outside of his home as well.

At the presentencing hearing, the Government offered several exhibits as evidence in aggravation. Appellant objected to several pages of these exhibits on a variety of bases, including that the evidence was irrelevant, cumulative, and unfairly prejudicial. For example, Appellant objected to “cumulative” evidence of photos of the automobile Appellant wrecked; “confusing” documents “appearing” to depict “uncharged misconduct” of Appellant’s distribution of drugs; “irrelevant” pictures of Appellant’s rooms in “disarray”; “unfairly prejudicial” pictures of prescription bottles; “irrelevant” and “unfairly prejudicial” photos of a shotgun discovered in Appellant’s home; and evidence of “uncharged misconduct” that Appellant threatened that he would shoot another Marine if that Marine reported Appellant’s drug use. The military judge overruled most of these objections but assured the Defense that he would not be “confused” by the evidence, nor would he sentence Appellant for crimes not charged. Appellant claims these rulings constituted an abuse of discretion.

Appellant also claims that the military judge committed plain error when he admitted other sentencing evidence absent Defense objection. This evidence includes “cumulative” and “confusing” pages of an evidentiary log involving the same shotgun; text messages that evince the “uncharged misconduct” of distributing drugs; and finally, “irrelevant” evidence that Appellant’s wife was using drugs, and evidence that Appellant discussed using fake urine for use during a drug test. Additional facts necessary to resolution of the issues are discussed below.

II. DISCUSSION

A. Aggravation Evidence

After the Government offered its first exhibit in aggravation, the defense counsel articulated generally his anticipated future objections:

[J]ust so the Court [is] aware . . . our theory of where our objections are going to come from. The evidence is mixing the acts—that we discussed about in providence and as charged—with items recovered from, essentially, Corporal Borgfeldt’s possession related to the withdrawn language . . . [e]ssentially, uncharged misconduct that is really interwoven in many of these

multiple-page exhibits. That's where our discussion will be, just so you can see where we're going with our objections.³

The Defense then lodged several objections to the Government's evidence on grounds of relevance, cumulateness, and confusion or unfair prejudice. To each objection, the military judge allowed the trial defense counsel to fully articulate his objection, asked the trial counsel for the Government's position, and then ruled. While the military judge did not specifically articulate his analysis under MILITARY RULE OF EVIDENCE 403⁴ where relevant, he did provide periodic insights, such as:

The cumulative issue is not an issue . . . for this military judge

. . . .

I assure you this sentencing authority is not confused. I'm aware of what your client has pled guilty to and what your client has pled not guilty to, what he has been found guilty of, as well. So this particular sentencing authority is not confused.

. . . .

The [permissible] aggravation is [that] your client threatened to shoot somebody if they told on him. That's aggravating.

. . . .

[I]f your client attempted to prevent somebody from telling on him about his drug usage, then that is aggravating. . . . The Court will give [aggravating evidence] its due weight in light of the comments that the defense counsel made in his argument just now.

. . . .

[T]he Court is not going to sentence Corporal Borgelt for a crime for which he hasn't been convicted. So he hasn't been convicted for selling drugs. He's not going to be sentenced for selling drugs. He has not been convicted of distributing drugs. He's not going to be sentenced for distributing drugs.⁵

³ Record at 72-73.

⁴ MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.) (MCM).

⁵ Record at 77, 80, 86, 87, 91.

Appellant now argues that the military judge erred when he admitted this evidence as well as evidence to which trial defense counsel failed to object and asks that this court “strike” such evidence and reassess the sentence.

The prosecutor may present evidence in aggravation during the presentencing phase of trial. RULE FOR COURTS-MARTIAL (R.C.M.) 1001(b)(4), MANUAL FOR COURTS-MARTIAL (2016 ed.). Evidence in aggravation is limited to matters “directly relating to or resulting from the offenses of which the accused has been found guilty.” *Id.* Evidence that qualifies under R.C.M. 1001(b)(4) must also pass the balancing test of MIL. R. EVID. 403, requiring the military judge to make a determination that the probative value of the evidence is not substantially outweighed by unfair prejudice. When defense counsel objects, a military judge’s decision to admit evidence in aggravation under R.C.M. 1001(b)(4) is reviewed for an abuse of discretion. *United States v. Ashby*, 68 M.J. 108, 120 (C.A.A.F. 2009). If we find such an abuse, we test the admission of such evidence “to determine if the error substantially influenced the adjudged sentence.” *United States v. Griggs*, 61 M.J. 402, 410 (C.A.A.F. 2005).

When there is no defense objection to the evidence, we review for plain error. *United States v. Hardison*, 64 M.J. 279, 281 (C.A.A.F. 2007). In such cases, Appellant bears the burden of demonstrating that: (1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of the appellant. *United States v. Payne*, 73 M.J. 19, 23-24 (C.A.A.F. 2014). Here, and for the sake of efficiency and argument, we will assume error and evaluate whether any such errors substantially influenced Appellant’s sentence.

“As we weigh the factors in determining whether [sentencing error was] prejudicial, we weigh factors on both sides.” *United States v. Eslinger*, 70 M.J. 193, 201 (C.A.A.F. 2011). To that end, we begin by noting that, although he was not entirely clear as to why Appellant was on trial, Appellant’s officer in charge testified that Appellant was proficient and an asset to the unit. Appellant also had an average proficiency and conduct mark of 4.0 and 4.5 respectively. On the other hand, Appellant was sentenced after submitting a comprehensive stipulation of fact wherein he described his possession, use and introduction of illegal substances onto an installation as well as details how he crashed another Marine’s borrowed car into a security fence on base causing damage in excess of twenty thousand dollars. Pleading guilty to these charges, Appellant then explained these acts in detail to the military judge. Although Appellant was facing over thirty-four years of confinement and a dishonorable discharge for these offenses, an experienced military judge who made it clear that he would not sentence Appellant for crimes for which he was not found guilty, sentenced Appellant to thirty-six months of confinement and a bad conduct discharge. *See United States v. Bridges*, 66 M.J. 246,

248 (C.A.A.F. 2008) (“As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary.”). Weighing these factors, we are satisfied that any erroneously admitted evidence did not influence Appellant’s sentence.

B. Ineffective Assistance of Counsel

In response to the military judge’s question asking whether he possessed drugs anywhere else, Appellant responded, “No, Your Honor.” However, he also admitted he bought the drugs while off base and brought them to his home. Trial defense counsel asked the military judge to ask Appellant again if he had possessed any of the controlled substances elsewhere beyond his home and Appellant then clarified that he had possessed the drugs “on [his] person and in [his] vehicle[.]” Appellant now argues his trial defense counsel’s efforts to clarify this issue, “[n]ot only [elicited] a greater degree of culpability, it also presented a question of truthfulness, since [Appellant] had just asserted that he only possessed drugs in his home.”⁶

To establish ineffective assistance of counsel, “an appellant must demonstrate both (1) that his counsel’s performance was deficient, and (2) that this deficiency resulted in prejudice.” *United States v. Green*, 68 M.J. 360, 361 (C.A.A.F. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). It is clear from the record—prior to the Defense-requested question—that Appellant had purchased the drugs off base and taken them to his on base home. We therefore concur with Appellee that trial defense counsel simply sought clarification of Appellant’s erroneous answer to protect Appellant from “appearing that he concealed facts during the providence inquiry, and allowed him to argue that Appellant fully accepted responsibility for his actions, which Appellant embraced in his unsworn statement.”⁷ This assignment of error is without merit.

C. Cumulative Error

Finally, Appellant claims that the preserved and forfeited errors made by the military judge in the admission of evidence at presentencing as well as the trial defense counsel’s “ineffective” assistance, amounts to “cumulative error” that requires relief. The cumulative error doctrine provides that “a number of errors, no one perhaps sufficient to merit reversal, in combination

⁶ Appellant’s Brief of 3 Oct 2018 at 18.

⁷ Appellee’s Brief of 2 Jan 2019 at 21.

[can] necessitate [relief].” *United States v. Banks*, 36 M.J. 150, 170-71 (C.M.A. 1992) (citation and quotation marks omitted). This Court will reverse only if it finds the cumulative errors denied Appellant a fair trial. *Id.* at 171. Having determined that any error committed by the military judge was not prejudicial and that trial defense counsel was not ineffective, the doctrine of cumulative error is inapplicable.

III. CONCLUSION

After careful consideration of the record and briefs of appellate counsel, we have determined that the approved findings and sentence are correct in law and fact and that no error materially prejudicial to Appellant’s substantial rights occurred. Arts. 59, 66, UCMJ. However, we note that the court-martial order does not accurately reflect that the language to which Appellant pleaded not guilty is to be dismissed with prejudice upon completion of appellate review. Although we find no prejudice from this scrivener’s error, Appellant is entitled to have court-martial records that correctly reflect the outcome of his court martial, *United States v. Crumpley*, 49 M.J. 538, 539 (N-M. Ct. Crim. App. 1998), and we order correction of records in this case to accurately reflect such status. The findings and sentence as approved by the convening authority are **AFFIRMED**.



FOR THE COURT:

A handwritten signature in blue ink, appearing to read "Rodger A. Drew, Jr.", with a stylized flourish at the end.

RODGER A. DREW, JR.
Clerk of Court