IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

D.A. WAGNER **R.E. VINCENT** **E.B. STONE**

UNITED STATES

v.

Dale J. NUGIEL
Lieutenant (O-3), Dental Corps, U. S. Naval Reserve

NMCCA 200400283 Decided 20 March 2006

Sentence adjudged 28 April 2003. Military Judge: R.S. Chester. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, 1st Force Service Support Group (REAR), MarForPac, Camp Pendleton, CA.

LCDR M. EVERSOLE, JAGC, USNR, Appellate Defense Counsel
LT ANTHONY YIM, JAGC, USNR, Appellate Defense Counsel
Maj KEVIN HARRIS, USMC, Appellate Government Counsel
LCDR RUSSELL CONROW, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WAGNER, Senior Judge:

A general court-martial composed of a military judge, sitting alone, convicted the appellant, pursuant to his pleas, of wrongful use of cocaine, wrongful use of methamphetamine, wrongful distribution of methamphetamine, and fraternization, in violation of Articles 112a and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 912a and 934. The appellant was sentenced to confinement for 66 months, total forfeitures, a fine of $5,000.00, and a dismissal. The military judge added an enforcement term of 36 months of confinement in the event the fine remained unpaid. Following trial and as an act of clemency, the convening authority deferred automatic forfeitures and $500.00 of the adjudged forfeitures until the convening authority's action was issued. In that action, the convening authority approved the sentence as adjudged and, pursuant to the terms of a pretrial agreement, suspended confinement in excess of 18 months and suspended forfeitures in excess of 2/3 pay per month should the appellant remain in a pay status after the approved and unsuspended confinement ended.

We have considered the record of trial, the three assignments of error, and the Government's response. The appellant alleges that the military judge erred by not informing the appellant that a fine could be adjudged in his case. The appellant also alleges that the military judge committed plain error by considering evidence of uncharged misconduct on sentencing. Finally, the appellant alleges that the sentence including a dismissal is inappropriately severe in his case. We agree with the appellant as to the first assignment of error and will take corrective action in our decretal paragraph. Following our corrective action, we conclude that the findings and the remaining sentence are correct in law and fact and that no other error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

Fine

Both this court and our superior Court have previously held that a fine may not be imposed in a guilty plea case involving a pretrial agreement unless the record is clear that the appellant was made aware of the limits of his potential pecuniary loss. *United States v. Williams*, 18 M.J. 186, 189 (C.M.A. 1984); *United States v. Whitekiller*, 8 M.J. 772, reconsidered, 8 M.J. 620, 621 (N.M.C.M.R. 1979). In other words, if the record of trial leaves doubt as to whether the appellant knew that a fine above and beyond the limits of forfeitures could be adjudged, this court is not at liberty to guess.

The Government urges us to conclude that the appellant was adequately informed of the possibility of a fine because the boilerplate language of the pretrial agreement indicates that a fine is a lawful punishment at a court-martial. We decline to do so. The civilian defense counsel indicated that he had informed the appellant that the maximum punishment that could be imposed was a dismissal, 27 years confinement, and total forfeitures. The military judge reiterated that limit. The appellant agreed that he understood that to be the limit when he entered his pleas of guilty. There was no mention that the sentence could also include other lawful punishments, as defined in the boilerplate language of the pretrial agreement.

We conclude that, absent a showing the appellant understood the maximum punishment could include a pecuniary loss in excess of forfeiture limits, a fine cannot be imposed in addition to forfeitures.

Uncharged Misconduct

The Government presented evidence on sentencing that the appellant, a dentist, had written unauthorized prescriptions for an enlisted service member and has prescribed medication for a person whom he was not authorized to treat. The appellant contends this was plain error. We disagree.

There was no objection at trial to either piece of evidence. The service member to whom the unauthorized prescriptions were written was the same enlisted service member who was the subject of the fraternization offense of which the appellant stood convicted. As such, unlawful activity between the two is directly related to that offense and appropriate for consideration on sentencing. RULE FOR COURTS-MARTIAL 1001(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2002 ed.); *see United States v. Wingart*, 27 M.J. 128, 135 (C.M.A. 1988); *United States v. Vickers*, 13 M.J. 403, 406 (C.M.A. 1982). The evidence indicating that the appellant had prescribed medication for a person whom he was not authorized to treat was offered in rebuttal to the evidence presented by the defense as to the appellant's good character and potential for rehabilitation. As such, it was proper rebuttal evidence. R.C.M. 1001(d). As our superior court has stated, "Defense counsel chose to open the door regarding accused's good military character with the luxury of having witnesses who could not be cross-examined about their opinions. The Government was properly afforded the opportunity to respond. Absent an abuse of discretion, the military judge's ruling should be allowed to stand." *United States v. Hallum*, 31 M.J. 254, 256 (C.M.A. 1990).

Sentence Appropriateness

In the appellant's final assignment of error, he asserts his sentence is inappropriately severe, specifically that a dismissal is too severe in light of the other punishments he has received. We decline to grant relief.

In determining the appropriateness of a sentence, we are to afford the appellant individualized consideration under the law. Specifically, we must review the appropriateness of the sentence based upon the "'nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267-68 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (C.M.A. 1959)). This requires a balancing of the offenses against the character of the offender.

The appellant, a commissioned officer, abused both his status as an officer and as a licensed dentist. He was involved in extensive criminal activity that involved an enlisted service member. Under the circumstances of this case, the seriousness of the offenses clearly outweighed the mitigating evidence that was produced at trial. The adjudged and approved sentence is appropriate for this offender and his offenses.

Conclusion

That portion of the sentence that included a fine of $5,000.00 and its enforcement provision, are set aside. The

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

Judge VINCENT and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court