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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **J.F. FELTHAM**

UNITED STATES

v.

Vangle S. HARDISON
Seaman (E-3), U.S. Navy

NMCCA 200200753 Decided 29 August 2005

Sentence adjudged 3 October 2001. Military Judge: J.V. Garaffa. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Naval Submarine Base, Kings Bay, GA.

Capt ROLANDO R. SANCHEZ, USMC, Appellate Defense Counsel
Capt GLEN R. HINES, USMC, Appellate Government Counsel

PRICE, Senior Judge:

Contrary to her pleas, the appellant was convicted of wrongful use of marijuana, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. A special court-martial consisting of officer members sentenced her to a bad-conduct discharge. The convening authority approved the sentence as adjudged.

The appellant contends that the military judge committed plain error by admitting preservice drug use and drug waiver evidence in aggravation. She also asserts that the sentence is inappropriately severe. Having considered these contentions and the Government's response, as well as the record of trial, we specified the following issue for briefing:

> Was the appellant deprived of the effective assistance of counsel by the trial defense counsel's failure to object to the trial counsel's offer of Prosecution Exhibits 14 and 15 in aggravation? *See United States v. Martin*, 5 M.J. 888, 889 (N.C.M.R. 1978); *but cf.*

United States v. Honeycutt, 6 M.J. 751, 753 (N.C.M.R. 1978).

We have carefully considered the record of trial, the assignments of error, the Government's response, the specified issue and the responsive briefs. 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.

Preservice Drug Use in Aggravation

In aggravation, the trial counsel offered Prosecution Exhibits (PE) 14 and 15. PE-14 is a standard DD Form 1966, Record of Military Processing, used in recruiting. Included in this exhibit is the appellant's admission that she had previously used or possessed unlawful drugs. PE-15 is NAVCRUIT Form 1122/65, U.S. Navy Alcohol and Drug Abuse Screening Certificate. Included in this exhibit is the appellant's admission that she had used marijuana within the past six months. The trial defense counsel had no objection to these exhibits. Without objection, the military judge admitted both exhibits. In her case in extenuation and mitigation, the appellant offered nothing that alluded to her preservice drug abuse.

During a brief sentencing argument, the trial counsel told the members, "She knew better. She came in on a drug waiver. She knew the Navy's drug policy and she violated it anyway. She knew she would have to be tested, yet, she chose to do drugs anyway." Record at 404. There was no objection to the argument. The trial counsel then argued for a sentence including confinement for 60 days and a bad-conduct discharge. The trial defense counsel did not comment on the appellant's preservice drug abuse in argument.

Since the trial defense counsel did not object, any error was waived in the absence of plain error. *United States v. Powell*, 49 M.J. 460, 465 (C.M.A. 1998); MILITARY RULE OF EVIDENCE 103(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.); RULE FOR COURTS-MARTIAL 1001(b)(2), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.). Plain error exists when (1) an error was committed; (2) the error was plain, or clear and obvious; and (3) the plain error affected substantial rights. *Powell*, 49 M.J. at 463-65.

We disagree with the appellant that the military judge committed clear and obvious error in admitting PE-14 and PE-15. Our precedents in two cases do not clearly state whether evidence of preservice misconduct is admissible. Given the confusion in our case law, we cannot hold that the military judge committed clear and obvious error in admitting Prosecution Exhibits 14 and 15.

In *United States v. Martin*, 5 M.J. 888, 889 (N.C.M.R. 1978), the defense objected to two exhibits offered to show preservice

use of drugs and a recruiting waiver to permit enlistment. After the military judge admitted the exhibits, the trial counsel emphasized them in successfully arguing for a bad-conduct discharge. In holding that the military judge committed prejudicial error in admitting the exhibits, this court stated: "Once a member qualifies for entry, his past misdeeds should not be held against him and he should be able to start off with a clean slate." *Id.* *See United States v. Baughman*, 8 M.J. 545, 549 (C.G.C.M.R. 1979)(concluding that evidence of a prior conviction must be for misconduct while a member of the armed forces).

Three months later, this court issued a split decision in *United States v. Honeycutt*, 6 M.J. 751, 753 (N.C.M.R. 1978). The majority held that evidence of preservice drug use was admissible to "better define the enormity of the crimes for which the appellant was sentenced," namely, sales of drugs to other service members. *Id.* The dissent relied on *Martin* in arguing that the evidence was inadmissible.

Since *Martin* and *Honeycutt* were decided, neither this court nor our superior court has clarified the law on the admissibility of preservice drug use or other misconduct.[1] Given that legal landscape, we hold that the military judge did not commit clear and obvious error when he did not *sua sponte* exclude Prosecution Exhibits 14 and 15. This assignment of error lacks merit.

Ineffective Assistance of Counsel

In response to the specified issue, the appellant asserts that his counsel was deficient in failing to object to the exhibits. We disagree. We will not hold the trial defense counsel to a higher standard than we would the military judge. This issue has no merit.

Sentence Appropriateness

Finally, we address the appellant's argument that a bad-conduct discharge is inappropriately severe for her single offense of wrongful use of marijuana. We have considered the appellant's record, including the fact that this is the appellant's first brush with military law. We have also considered the seriousness of her offense. After reviewing the entire record, we conclude that the sentence is appropriate for this offender and her offense. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

[1] We recommend that the Joint Service Committee consider proposing an amendment to R.C.M. 1001(b)(2) that would clarify whether evidence of preservice misconduct is inadmissible under that rule.

Conclusion

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

Chief Judge DORMAN and Judge FELTHAM concur.

For the Court

R.H. TROIDL
Clerk of Court