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

BEFORE

Charles Wm. DORMAN **C.A. PRICE** **E.B. STONE**

UNITED STATES

v.

Hector MUNOZ
Corporal (E-4), U.S. Marine Corps

NMCCA 200500640 Decided 30 August 2005

Sentence adjudged 18 May 2004. Military Judge: D.S. Oliver. Review pursuant to Article 66(c), UCMJ, of Special Court-Martial convened by Commanding Officer, Marine Wing Support Squadron 372, MWSG 37, Camp Pendleton, CA.

Capt JEFFREY S. STEPHENS, USMC, Appellate Defense Counsel
LT DEBORAH MAYER, JAGC, USNR, Appellate Government Counsel

DORMAN, Chief Judge:

The appellant was convicted by special court-martial of a single specification of the wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. A panel composed of enlisted members sentenced the appellant to confinement for 50 days, reduction to pay grade E-2, and a bad-conduct discharge. Upon taking action, the convening authority approved the sentence, but suspended all confinement for a period of 12 months from the date of trial. The suspension was in compliance with the terms of the negotiated pretrial agreement.

The appellant raises a single assignment of error. He alleges that the trial counsel committed plain error due to the questions he asked witnesses during the sentencing phase of the trial and due to the content of his argument on sentencing. The appellant asserts that the trial counsel's questions and argument impermissibly focused the members' attention to the Marine Corps' "zero tolerance" policy concerning drugs.

After carefully considering the record, the appellant's assignment of error and brief, and the Government's Answer, we conclude that the findings and sentence are correct in law and fact. We also conclude that no error was committed that was materially prejudicial to the appellant's substantial rights. Arts. 59(a) and 66(c), UCMJ.

'Zero Tolerance" Policy

Upon close examination of the record, we do not agree with the appellant's assessment that the trial counsel asked questions to the members that either directly or inferentially referred to a zero tolerance policy concerning drugs. Although the trial counsel did ask an inappropriate question concerning whether a Marine who violates the UCMJ should be retained, the military judge properly sustained a defense objection to the question. Record at 156. The military judge immediately followed with a curative instruction. Court members are presumed to follow instructions. *United States v. Jenkins*, 54 M.J. 12, 20 (C.A.A.F. 2000). We presume the members followed that instruction.

We note that a panel of all enlisted members tried the appellant. None of the members of the initial panel participated in the appellant's sentencing hearing. All but one member of the initial panel were excused by the military judge after they expressed an inflexible attitude concerning an appropriate sentence for a noncommissioned officer convicted of using drugs. After the convening authority appointed new members, the military judge conducted group voir dire. During voir dire, the military judge addressed the Marine Corps policy concerning "zero tolerance." He told the members, "These policies must be disregarded by you in this criminal trial, and you must base your decision of an appropriate sentence solely on the evidence presented in this courtroom and the instructions I will give you." Record at 121. Thereafter all the members indicated they could disregard those zero tolerance policies. Again, we will presume the members followed that instruction. *Jenkins*, 54 M.J. at 20.

During argument, the trial counsel told the members, "all Marines must know and see that drug use is, in fact, not accepted in the Marine Corps." Record at 182. He also argued that the appellant should be sentenced to confinement for 90 days, reduced to pay grade E-1, and discharged with a bad-conduct discharge. He suggested that that would be an appropriate sentence so as to "to show Marines . . . that drug use will not be tolerated in the Marine Corps . . . ." *Id*. at 184. The trial counsel never specifically mentioned the Marine Corps policy of zero tolerance. The trial defense counsel did not object to the argument.

We find that the trial counsel did not improperly inject a zero tolerance argument into his sentencing argument. His argument was properly couched in terms of the sentencing principle of general deterrence. The trial counsel may have

struck hard blows, but they were fair. *United States v. Doctor*, 21 C.M.R. 252, 259 (C.M.A. 1956)(citing *Berger v. United States*, 295 U.S. 78 (1935)). We do find, however, that the trial counsel improperly argued facts not in evidence when he argued that the appellant had attempted to get two females to lie by stating that they had put cocaine in something he had been drinking. We find that error harmless.

Conclusion

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

Senior Judge PRICE and Judge STONE concur.

For the Court

R.H. TROIDL
Clerk of Court