UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MICHAEL BAILON
United States Air Force

ACM 36912

24 January 2008

Sentence adjudged 15 June 2006 by GCM convened at Vance Air Force Base, Oklahoma. Military Judge: Barbara Brand (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 21 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Mark D. Hoover, and Captain John S. Fredland.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Colonel George F. May, Major Matthew S. Ward, and Captain Donna S. Rueppell.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

PER CURIUM:

The appellant was tried at Vance Air Force Base (AFB), Oklahoma, by a military judge sitting as a general court-martial. In accordance with his pleas, the appellant was found guilty of conspiracy to commit larceny, destruction of property, larceny, wrongful appropriation, and unlawful entry, in violation of Articles 81, 109, 121, and 130, UCMJ, 10 U.S.C. §§ 881, 909, 921, 930. He was also found guilty, in accordance with his pleas, of disobeying a lawful order, making false official statements, drunk driving, and wrongful use of marijuana, methamphetamine, and cocaine, in violation of Articles 92, 107, 111, and 112a, UCMJ, 10 U.S.C. §§ 892, 907, 911, 912a. The military judge sentenced the appellant to a bad-conduct discharge, confinement for 21 months, and reduction to E-1. The convening authority approved the sentence as adjudged.

On appeal, the appellant contends that (1) due process requires this Court to grant relief under *Barker v. Wingo*, 407 U.S. 514 (1972) and *United States v. Moreno*, 63 M.J. 129 (C.A.A.F. 2006) since the convening authority did not take action until 181 days after the military judge adjudged the appellant's sentence; and (2) multiple post-trial errors with the staff judge advocate's recommendation (SJAR) and addendum require the convening authority's action to be set aside and remanded for further processing consistent with Rule for Courts-Martial (R.C.M.) 1106. We have examined the record of trial, the assignments of error, and the government's response. We find merit in the appellant's second assignment of error and return the case for new post-trial processing.

Post-Trial Processing Delay

We review an appellant's right to speedy post-trial processing de novo. *Moreno*, 63 M.J. at 135. The appellant claims he was denied his right to due process by the 181 days that elapsed between sentencing and the convening authority's action. The appellant contends the delay prejudiced him by "negatively impacting his opportunity to receive meaningful clemency" because by the time he received his copy of the record of trial he had already met his parole board and been recommended for release from confinement.

In this case, we apply a presumption of unreasonableness where the action of the convening authority is not taken within 120 days of the completion of trial. *Id.* at 142. We therefore examine the four factors set forth in *Barker*: (1) The length of the delay; (2) The reasons for the delay; (3) The appellant's assertion of the right to timely review and appeal; and (4) Prejudice. *Moreno*, 63 M.J. at 135. We do not need to engage in a separate analysis of each factor where we can assume error and proceed directly to the conclusion that any error was harmless beyond a reasonable doubt. *United States v. Harrow*, 65 M.J. 190, 206 (C.A.A.F. 2007) (citing *United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006)). We apply this approach in the appellant's case. Having considered the totality of the circumstances and entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt and that no relief is warranted.

Post-Trial Processing Errors

The appellant alleges that multiple errors in the post-trial processing of his case require the case be returned for a new action, or in the alternative that we disapprove his bad-conduct discharge. Specifically, he asserts that the SJAR is defective in that it does not address legal issues raised by trial defense counsel; fails to make a specific recommendation as to the action to be taken by the convening authority; does not mention the fact that the appellant was subject to pretrial restriction; and does not inform the convening authority of the results of trial.

The appellant alleges the addendum to the SJAR fails to address legal errors raised by the trial defense counsel in the clemency submission. R.C.M. 1106(d)(4) requires that the staff judge advocate state whether corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105. The staff judge advocate's response may consist of a statement of agreement or disagreement with the matter raised by the accused. No analysis or rationale for the staff judge advocate's statement is required. R.C.M. 1106(d)(4). In the present case, the addendum to the SJAR pointed out that the trial defense counsel complained that the record of trial took too long to be completed. The addendum to the SJAR concluded with a recommendation to approve the sentence as adjudged. We find the language in the SJAR and the addendum to the SJAR satisfies the requirements of R.C.M. 1106(d)(4) and this assertion of error is without merit.

The appellant further asserts the addendum is defective because it does not make a specific recommendation regarding the action to be taken by the convening authority. Before taking action on the present case the convening authority must have received a specific recommendation from the staff judge advocate as to the action to be taken on the sentence. R.C.M. 1106(d)(3)(E). The SJAR in this case states that the sentence adjudged was appropriate, and the addendum to the SJAR explicitly recommends that the convening authority approve the sentence as adjudged. This assignment of error is without merit.

The appellant also alleges that the convening authority was not informed of the appellant's pretrial restraint. The appellant was subject to 71 days restriction prior to his court-martial. Neither the SJAR nor the addendum to it informed the convening authority that the appellant had been subject to pretrial restriction. Additionally, the personal data sheet attached to the SJAR and provided to the convening authority erroneously indicated there had been no pretrial restraint. Neither the appellant's clemency request nor the appellant's trial defense counsel's submission raised any objections to the SJAR or requested any additional credit for the pretrial restriction.

Because the SJAR was properly served on the defense counsel and the appellant, and the trial defense counsel failed to comment on the error, we review the omission for plain error. *See* R.C.M. 1106(f)(6). We review application of the plain error doctrine de novo. *See United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002); 2 Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 7.05 (3d ed. 1999). The appellant must show that (1) there was error, (2) the error was plain or obvious, and (3) the error materially prejudiced the appellant's substantial rights. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Because of the highly discretionary nature of the convening authority's action on a sentence, we may grant relief if an appellant presents "some colorable showing of possible prejudice." *Id.*

R.C.M 1106(d)(3)(D) requires the staff judge advocate to include a statement in the SJAR concerning the nature and duration of any pretrial restraint. Failure to include this information is error. *United States v. Wheelus*, 49 M.J. 283, 285 (C.A.A.F. 1998). In the present case we find that there was error and it is plain and obvious.

We next consider whether the error resulted in prejudice to the appellant's substantial right to have a request for clemency judged on the basis of an accurate record. We will not speculate on what the convening authority would have done if he had been presented with an accurate record. *United States v. Wellington*, 58 M.J. 420, 427 (C.A.A.F 2003) (citing *United States v. Jones*, 36 M.J. 438, 439 (C.M.A. 1993)). There is a significant difference between an accused who did not have any type of pretrial restraint imposed and an accused who was subject to 71 days of pretrial restriction. We conclude that the appellant has demonstrated a "colorable showing of possible prejudice" in that the convening authority did not have a complete and accurate record, which ultimately could have impacted his decision regarding the appellant's clemency request when post-trial action was taken. The appellant is entitled to relief on this point.

The appellant also asserts the SJAR is defective because it does not properly inform the convening authority of the pleas and findings of the court-martial. Notice of the pleas and findings are generally provided by Air Force Form 1359, Report of Result of Trial. Although listed as an attachment to the SJAR, the Form 1359 is not attached to the SJAR nor is located in the official record of trial. As noted above, however, we are returning the record for new post-trial processing. We need not, therefore, determine whether the convening authority was actually informed of the results of the trial. We trust the new SJAR will fully comply with R.C.M. 1106 and that the record will contain evidence of such compliance.

Conclusion

The convening authority's action is set aside. The record of trial will be returned to The Judge Advocate General for submission to the appropriate convening authority for new post-trial processing under Article 60, UCMJ, 10 U.S.C. § 860. Thereafter, Article 66(c), UCMJ, 10 U.S.C. § 866(c), shall apply.

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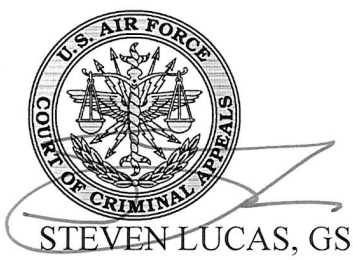

STEVEN LUCAS, GS-11, DAF
Clerk of the Court