UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic JOSHUA M. BAVOL
United States Air Force

ACM S31524

15 January 2009

Sentence adjudged 28 May 2008 by SPCM convened at Langley Air Force Base, Virginia. Military Judge: Stephen R. Woody.

Approved sentence: Bad-conduct discharge, confinement for 4 months, forfeiture of $898.00 pay per month for 6 months, and a reprimand.

Appellate Counsel for the Appellant: Major Shannon A. Bennett.

Appellate Counsel for the United States: Colonel Gerald R. Bruce.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

Pursuant to his pleas, a military judge found the appellant guilty of one specification of wrongful use of cocaine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A panel of officers sitting as a special court-martial sentenced the appellant to a bad-conduct discharge, six months confinement, forfeiture of "$893 [of his] pay for six months," and a reprimand. The convening authority approved the findings, the bad-conduct discharge, four months confinement, forfeiture of "$898.00 pay per month for six months," and the reprimand.* Finding error in the announcement of the sentence, we affirm the findings and reassess the sentence.

* The appellant and the convening authority signed a pretrial agreement wherein the appellant agreed to plead guilty to the charge and specification in return for the convening authority's promise not to approve confinement in excess of four months.

Background

On 28 January 2008, the appellant and an acquaintance went to a house party at an off-base residence, and while there, the appellant was offered and snorted two lines of cocaine. At his first special court-martial a few days later, the appellant pled to and was found guilty of stealing property from the local base exchange. The adjudged and approved sentence consisted of a bad-conduct discharge, three months confinement, and forfeitures of $893 pay per month for three months. On 31 January 2008, the appellant began serving his term of confinement at the Norfolk Naval Brig, Virginia. As he in-processed into confinement, the appellant was required to submit a urine sample. The appellant submitted a urine sample, the sample was sent to a Navy drug screening laboratory, and the sample subsequently tested positive for benzoylecgonine, a cocaine metabolite.

On 28 May 2008, the appellant providently pled and was found guilty of wrongfully using cocaine. In announcing the forfeiture portion of the sentence, the court-martial president announced "Airman Basic Joshua M. Bavol, this court-martial sentences you . . . *to forfeit $893 of your pay for 6 months* . . . ." (Emphasis added). However, on the appellant's sentencing worksheet, the members stated the appellant's forfeiture as a forfeiture of "*$898.00* [of his] pay *per month* for 6 months." (Emphasis added).

On 25 July 2008, the convening authority approved, *inter alia*, a "forfeiture of *$898.00* pay *per month* for six months." (Emphasis added). The announced sentence is erroneous in two aspects. First, the amount announced to be forfeited ($893) differs from the amount highlighted on the sentencing worksheet to be forfeited ($898). Second, and equally important, the court-martial president, in announcing the forfeitures, omitted the words "per month." Neither the military judge nor the convening authority noticed the disparity between the announced sentence and the sentence reflected on the sentencing worksheet and thus did not take action to address the disparity. Though not raised as an issue on appeal, we will address this disparity.

Erroneous Sentence Announcement

When a court-martial sentences an accused to forfeitures, the amount is to be stated in whole dollars per month and the number of months the forfeitures will last. Rule for Courts-Martial (R.C.M.) 1003(b)(2); *United States v. Gaston*, 62 M.J. 404, 408 (C.A.A.F. 2006); *United States v. Johnson*, 32 C.M.R. 127, 128 (C.M.A. 1962). Because the announced amount of forfeitures differs, albeit slightly, from the amount reflected on the sentencing worksheet, we find the amount announced ($893) shall be the amount forfeited. Moreover, since the announced sentence did not include the words "per month," we find that the amount announced shall be the *total amount* to be forfeited. *See United States v. Jones,* 60 M.J. 964, 972 (A.F. Ct. Crim. App. 2005).

Post-Trial Delay in Forwarding Record of Trial

The convening authority took initial action in this case on 25 July 2008, yet the record of trial did not reach this Court until 15 September 2008, in excess of the 30-day time limit. *United States v. Moreno*, 63 M.J. 129, 142 (C.A.A.F. 2006). Though not raised as an issue on appeal, we review de novo the issue of whether an appellant has been denied the due process right to a speedy post-trial review and appeal. *Id.* (citing *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004); *United States v. Cooper*, 58 M.J. 54, 58 (C.A.A.F. 2003)).

In conducting this review, we follow our superior court's guidance in using the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): (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. *Id.* (citing *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005); *United States v. Toohey*, 60 M.J. 100, 102 (C.A.A.F. 2004)). When we assume error, as in this case, but are able to directly conclude that any error was harmless beyond a reasonable doubt, we need not engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the 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. Accordingly, no relief is warranted.

Action

In the Action, dated 25 July 2008, the convening authority approved a bad-conduct discharge, confinement for four months, forfeitures as previously addressed, and a reprimand. Although not raised on appeal, we note that neither the Action nor the promulgating order contain reprimand language. A reprimand, if approved, must be in writing in the convening authority's Action. R.C.M. 1003(b)(1) and 1107(f)(4)(G). Despite stating that he approved the reprimand, the convening authority did not include reprimand language in the Action or in any other document in the record. Accordingly, we do not affirm that portion of the sentence consisting of a reprimand. *United States v. Casey*, 32 M.J. 1023 (A.F.C.M.R. 1991).

Erroneous Promulgating Order

Finally, we note that the promulgating order is erroneous in several aspects. First, despite the single charge, the order lists the charge as "Charge I" rather than "Charge." Additionally, under the distribution section, the military judge's rank should be "Col" vice "Lt Col." Preparation of a corrected court-martial order is hereby directed. *See United States v. Smith*, 30 M.J. 1022, 1028 (A.F.C.M.R. 1990).

Conclusion

We affirm only so much of the sentence as provides for a bad-conduct discharge, confinement for four months, and forfeiture of $893 pay for one month. All rights, privileges, and property, of which the appellant has been deprived by virtue of the execution of forfeitures approved by the convening authority, which have not been affirmed, will be restored. The approved findings and the sentence, as modified, are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed,* 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the approved findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court