UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Colonel JOEL S. BOGNER
United States Air Force

ACM 38194

15 November 2013

Sentence adjudged 6 June 2012 by GCM convened at Wright-Patterson Air Force Base, Ohio. Military Judge: Thomas W. Cumbie (sitting alone).

Approved Sentence: Dismissal and a reprimand.

Appellate Counsel for the Appellant: Major Daniel E. Schoeni and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel C. Taylor Smith; Major Erika L. Sleger; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

WIEDIE, Judge:

A general court-martial composed of a military judge sitting alone convicted the appellant, consistent with his pleas, of larceny of military property of a value of more than $500 between 1 September 2006 and 1 October 2008 and of making false claims on divers occasions between 1 September 2006 and 1 October 2008, in violation of Articles 121 and 132, UCMJ, 10 U.S.C. §§ 821, 832. Also consistent with his pleas, the appellant was found not guilty of larceny of military property of a value of more than $500 between 1 October 2008 and 8 January 2010 and of making false claims on divers occasions between 1 October 2008 and 8 January 2010. The adjudged sentence consisted

of a dismissal and a reprimand. The convening authority approved the sentence as adjudged.

On appeal, the appellant asks this Court to return the record of trial to The Judge Advocate General for remand to the convening authority for a new staff judge advocate recommendation (SJAR) and a new Action because the SJAR misstated the maximum punishment authorized in his case. The appellant also argues that his sentence, which included an unsuspended dismissal, was inappropriately severe. The appellant asks that this Court return his case to the convening authority to consider whether to suspend a portion of the sentence.[1] Finding no prejudicial error, we affirm the findings and sentence.

Background

The appellant was a member of the Air Force Reserves assigned to the 439th Aerospace Medicine Squadron, Westover Air Reserve Base, Massachusetts. During all times relevant to the charges in this case, he was serving on active duty pursuant to Title 10, United States Code.

In 2006, the appellant embarked on a scheme to receive lodging entitlements he was not authorized to receive. When the appellant was first activated, he stayed in a hotel and was properly reimbursed for the lodging expenses he incurred. However, shortly after being activated, the appellant entered into a plan with a Mr. David Hite to purchase a motor home together and pay for it with the monies the appellant received for lodging expenses. The appellant secured a loan to purchase the motor home, but the title was put only in Mr. Hite's name, although the appellant and Mr. Hite co-owned the motor home.

The appellant was aware he was not entitled to receive reimbursement of lodging expenses for a property he co-owned. In order to receive lodging reimbursement, the appellant and Mr. Hite created a fake lease which provided that the appellant was paying $2,281.25 a month to rent the motor home from Mr. Hite. This lease purported to run from 1 September 2006 through 30 September 2007. A second lease was subsequently created covering the period from 1 September 2007 through 30 September 2008 at the same rental rate. The appellant submitted false rental receipts along with his travel vouchers in order to receive lodging reimbursement in an amount in excess of $42,000 from the United States Air Force.

In discussing the maximum punishment in this case, trial counsel agreed that the two charges "should be considered one offense for sentencing." This reduced the maximum confinement that could be adjudged to 10 years, the maximum confinement for larceny of military property of a value of more than $500. Trial counsel then requested

[1] The second issue is filed pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

that the military judge determine the maximum allowable confinement based on the offense of larceny of property of a value of more than $500, which is 5 years of confinement. Trial counsel's stated reason for doing so was concern that an appellate court might determine the stolen lodging entitlements were not "military property" thereby reducing the permissible maximum sentence. Defense counsel did not object to the lowering of the maximum punishment and the military judge advised the appellant the maximum punishment included 5 years of confinement.

In his SJAR, the staff judge advocate (SJA) advised the convening authority that the "maximum sentence for the offenses for which the accused was convicted is 10 years confinement, dismissal, and total forfeitures." The appellant did not raise the issue concerning the maximum punishment in his clemency submissions and asserts for the first time on appeal that this advice to the convening authority was incorrect.

Post-Trial Processing

Proper completion of post-trial processing is a question of law, which this Court reviews de novo. *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000). Failure to timely comment on matters in the SJAR waives any later claim of error in the absence of plain error. Rule for Court-Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

In this case, the SJAR clearly misstated the maximum permissible punishment. The appellant and trial defense counsel responded to the SJAR, but did not object to the error, which waives the issue on appeal unless there is plain error. *See* R.C.M. 1106(f)(6); *Kho*, 54 M.J. at 65. "To prevail under a plain error analysis, [the appellant bears the burden of showing] that: '(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right.'" *Scalo*, 60 M.J. at 436 (quoting *Kho*, 54 M.J. at 65). While the threshold for establishing prejudice is low, the appellant must nevertheless make "some colorable showing of possible prejudice." *Kho*, 54 M.J. at 65 (quoting *United States v. Wheelus*, 49 M.J. 283, 289 (1998)) (internal quotations marks omitted).

Although the SJA was clearly mistaken when he misinformed the convening authority about the maximum confinement time, the error was harmless. The appellant defrauded the Air Force out of over $42,000. At trial, he did not specifically ask the military judge to impose a punishment that included a dismissal but he did ask for a punishment that did not include confinement. He received a punishment that only consisted of a dismissal and a reprimand. The only punishments the convening authority could approve were the dismissal and the reprimand. Under the circumstances of this case, we do not believe correct advice on the maximum punishment would have foreseeably led the convening authority to take any action other than the one he did, i.e. approving the sentence as adjudged.

Sentence Severity

This Court reviews sentence appropriateness de novo. *United States v. Lane*, 64 M.J. 1, 2 (C.A.A.F. 2006). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). "We assess sentence appropriateness by considering the particular appellant, the nature and seriousness of the offenses, the appellant's record of service, and all matters contained in the record of trial." *United States v. Bare*, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006), *aff'd*, 65 M.J. 35 (C.A.A.F. 2007); *see also United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982). Although we are accorded great discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Nerad*, 69 M.J. 138, 148 (C.A.A.F. 2010); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

Although this Court lacks the authority to suspend a punitive discharge, we can remand the case to the convening authority with directions limiting the punishment that can be approved. *See United States v. Bell*, 30 M.J. 168 (C.M.A. 1990). In *Bell*, our superior court ordered the Navy and Marine Corps Court of Criminal Appeals to consider whether or not it should remand the case to the convening authority "with directions that no sentence be approved if it includes punishment greater than a discharge suspended under proper conditions" in light of the fact that "the . . . sentence he has approved is inappropriate." *Id.*

We find that the approved sentence was clearly within the discretion of the military judge and the convening authority, was appropriate in this case, and was not inappropriately severe. Based on this conclusion, it would inappropriate to remand the appellant's case to the convening authority. In this case, the appellant seriously compromised his standing as an officer, commander,[2] and military member. He defrauded the Air Force out of over $42,000 in a criminal scheme spanning two years. After carefully examining the submissions of counsel, the appellant's military record, and taking into account all the facts and circumstances surrounding the offenses to which the appellant pled and was found guilty, we do not find that the appellant's sentence, one which includes an unsuspended dismissal, is inappropriately severe.

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles

[2] During a portion of the time period the appellant was fraudulently receiving lodging reimbursements, he served as the commander of the 439th Aerospace Medicine Squadron.

59(a) and 66(c), UCMJ, 10 U.S.C. § 859(a), 866(c); *United States v. Reed*, 54 M.J. 37 (C.A.A.F. 2000). Accordingly the approved findings and sentence are

AFFIRMED.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court