UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Staff Sergeant PATRICK D. BOOKER
United States Air Force

ACM S30276

18 April 2005

Sentence adjudged 29 August 2002 by SPCM convened at Lackland Air Force Base, Texas. Military Judge: Steven A. Hatfield and Patrick M. Rosenow.

Approved sentence: Bad-conduct discharge and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Kyle R. Jacobson, Major Rachel E. VanLandingham, and Major Jennifer K. Martwick.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Kevin P. Stiens.

Before

STONE, GENT, and SMITH
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

SMITH, Judge:

The appellant was convicted, contrary to his pleas, by a special court-martial consisting of enlisted members, of two specifications of wrongful use of marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence included a bad-conduct discharge, hard labor without confinement for 3 months, and reduction to E-1. The convening authority approved a bad-conduct discharge and reduction to E-1. For the reasons set forth below, we find error and return the case for new post-trial processing. Upon completion of post-trial processing, this Court will consider the appellant's assigned errors.

Although not raised by the appellant or the government, we have identified omissions from the post-trial clemency matters submitted to the convening authority. The trial defense counsel's clemency submission, dated 23 December 2002, lists two attachments: (1) an Automated Military Justice Analysis and Management System (AMJAMS) printout, three pages; and (2) a Retirement Pay Chart, one page. The addendum to the staff judge advocate's recommendation (SJAR), dated 27 December 2002, advised the convening authority that he must consider the matters submitted by the appellant and his trial defense counsel, listing nine attachments. The first attachment is an "Index of Defense Clemency Package, undated," and attachment 8 is described as "AMJAMS Court-Martial Query Results, undated." Neither attachment is in the record of trial.

We are not particularly concerned with attachment 1 of the addendum to the SJAR, the index. It should be there, but presumably there was no substantive information in it and there is no mention of an index in the trial defense counsel's submission. We are concerned, however, with the absence of the AMJAMS printout. The thrust of the clemency package was avoidance of the bad-conduct discharge for a noncommissioned officer with 17 years of service. The trial defense counsel referred to the AMJAMS printout in his clemency petition, asserting generally that the punishments he found for staff sergeants convicted by special courts-martial of marijuana use in 2001 and 2002 showed that "a Bad Conduct Discharge is not a standard punishment across the Air Force." That general summary is not an adequate substitute for the specific case information one would presume to be in the attachment. There is no independent evidence in the record to show what documents the convening authority actually reviewed.

Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2), requires the convening authority to consider matters submitted by an accused before taking action on a sentence. Appellate courts will not speculate on whether a convening authority considered these materials. *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989) (citing *United States v. Siders*, 15 M.J. 272, 273 (C.M.A. 1983)). Under certain circumstances, this Court will presume a convening authority received and considered an appellant's clemency submissions. *United States v. Briscoe*, 56 M.J. 903, 909 (A.F. Ct. Crim. App. 2002). Where the record is ambiguous, we sometimes allow the government to "enhance the 'paper trail'" by submitting documents and affidavits on appeal. *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989). *See also Briscoe*, 56 M.J. at 909. We decline to apply a presumption of regularity in this case or to order submission of documents and affidavits to correct the error because we lack confidence in the handling of post-trial matters. Moreover, returning the case for new post-trial processing will allow the parties to consider: (1) The appellant's claim that he was provided ineffective assistance of counsel during post-trial processing; and (2) The staff judge advocate's failure to advise the convening authority of the correct maximum punishment.

Accordingly, we return the record of trial to the Judge Advocate General for remand to the convening authority for new post-trial processing. Thereafter, Article 66, UCMJ, 10 U.S.C. § 866, shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court