UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic ANTHONY K. BRANCH
United States Air Force

ACM S31691

13 December 2010

Sentence adjudged 16 June 2009 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Thomas W. Cumbie (sitting alone).

Approved sentence: Bad-conduct discharge and confinement for 5 months.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major Reggie D. Yager, and Major Anthony D. Ortiz.

Appellate Counsel for the United States: Colonel Don M. Christensen, Captain Charles G. Warren, Captain Matthew F. Blue, and Gerald R. Bruce, Esquire.

Before

BRAND, ORR, and WEISS
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, a military judge sitting as a special court-martial convicted the appellant of one specification of making a false official statement and one specification each of divers wrongful use and distribution of marijuana, in violation of Articles 107 and 112a, UCMJ, 10 U.S.C. §§ 907, 912a. The convening authority approved the adjudged sentence of a bad-conduct discharge and confinement for five months.[1] On appeal the appellant asserts error in the post-trial processing of his case. Specifically, the staff judge advocate recommendation (SJAR) failed to address a legal

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[1] There was a pretrial agreement (PTA) that limited confinement to no more than 10 months.

issue raised by appellant in his post-trial clemency submissions. Finding no prejudicial error, we affirm.

Background

After receipt of the SJAR, the appellant submitted matters to the convening authority pursuant to Article 60, UCMJ, 10 U.S.C. § 860, and Rule for Courts-Martial (R.C.M.) 1105, consisting of trial defense counsel's "Petition for Clemency" and appellant's "Request for Clemency." In these submissions, appellant complained about unsafe conditions during his post-trial confinement. He claimed that during the time he was confined at a civilian confinement facility after his trial, but before being transferred to a military confinement facility, an "unstable" inmate told some other inmates that he had weapons and was going to try to kill the appellant, causing the appellant fear and sleeplessness. Appellant requested the convening authority to "[c]onsider the confinement conditions during my time at Cook County Jail, and . . . reduce my confinement based on a departure from accepted Air Force safety standards." Appellant's trial defense counsel stated in his petition:

> Because of the high standards that Military Confinement facilities are held to, it is rare for confinement conditions to form the basis for a clemency request. However, since Moody [Air Force Base] no longer has on-base confinement, these problems are becoming far more common. In a prior case at Moody, U.S. v. Davis, the military judge awarded two for one pretrial confinement credit based on overcrowded conditions. While AB Branch has not been subjected to the safety concerns of overcrowding, he has been unnecessarily placed in harm's way. His permanent facility, Keesler Confinement Facility, is clean, safe, and houses one inmate per cell. That is the standard that is, and should be, observed in a professional detention facility. Juxtaposed with the conditions at Cook County Jail, where one could be assaulted by any of three cellmates in the middle of the night, the stark difference is apparent.

The addendum to the SJAR included, as listed attachments, the submissions of both appellant and his trial defense counsel. In the addendum, the staff judge advocate (SJA) properly advised the convening authority to consider these clemency matters prior to taking final action in the case. The SJA also stated he had reviewed the clemency matters submitted by the defense and he recommended that the convening authority approve the findings and sentence as adjudged. The SJAR and addendum did not reference any legal errors or the conditions of appellant's confinement. In his signed endorsement to the addendum, the convening authority stated, "I have considered the attached matters before taking action on this case." The convening authority then signed the action approving the appellant's sentence as adjudged.

The appellant argues the claims in his clemency petition amounted to allegations of cruel and unusual punishment in violation of the Eight Amendment, U.S. CONST. amend. VIII; and Article 55, UCMJ, 10 U.S.C. § 855. Having raised an allegation of legal error, appellant asserts the SJA erred in not advising the convening authority in the SJAR whether corrective action was necessary on the findings or sentence as required by R.C.M. 1106(d)(4).[2] Appellant requests a new post-trial processing.

Law and Discussion

The SJA is not required to examine the record for legal errors; however, among the various required contents of the SJAR is the requirement that "[t]he staff judge advocate shall state whether, in the staff judge advocate's opinion, 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 or when otherwise deemed appropriate by the staff judge advocate." R.C.M. 1106(d)(4). The threshold question is whether the appellant raised legal error in his clemency submissions. The government argues, citing *United States v. Craig*, 28 M.J. 321, 324 (C.M.A. 1989), that appellant's claims do not amount to legal error. *Craig* affirmed the requirement that the SJA *must* respond to a post-trial allegation of legal error made by an accused or his counsel; however, the Court held that a claim challenging the exercise of court members' discretion in sentencing did not amount to legal error, therefore, no SJA comment was required. *Id*. at 324. Unlike in *Craig*, we find the contents of appellant's R.C.M. 1105 clemency submissions were enough to raise legal error and the SJA should have addressed the error as required by R.C.M. 1106(d)(4).

The government argues that even if the appellant's post-trial claims were enough to raise legal error, the SJA's response in the SJAR addendum was adequate to address the legal error, relying on *United States v. Catrett*, 55 M.J. 400, 407-08 (C.A.A.F. 2001). To be sure, in addressing whether corrective action should be taken because of legal error, the Rule does not require an extensive response from the SJA. "The response may consist of a statement of agreement or disagreement with matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal errors is not required." R.C.M. 1106(d)(4). In *Catrett*, the appellant claimed the SJA failed to properly respond to four legal errors described in great detail in the appellant's response to the SJAR. *Catrett*, 55 M.J. at 407. The Court found the following statement in the SJAR addendum "satisfied the *minimal-response requirement* of RCM 1106(d)(4)":

[2] Although appellant's clemency submissions addressed both unlawful pretrial and post-trial confinement conditions, appellate defense counsel acknowledges that appellant did not raise an Article 13, UCMJ, 10 U.S.C. § 813, violation (illegal pretrial punishment) at trial, thus waiving the issue, and therefore he is limiting his appeal to the SJA's failure to respond to appellant's claims of legal error involving post-trial conditions of confinement at the Cook County Jail.

> The matters submitted by the defense are attached to this Addendum and are hereby incorporated by reference. *Nothing contained in the defense submissions warrants further modification of the opinions and recommendations expressed in the Staff Judge Advocate's Recommendations.* Of course you must consider all written matters submitted before you determine the appropriate action to be taken in this case.

Id. at 408 (first emphasis added).

In the case sub judice, the addendum to the SJAR states:

> AB Anthony K. Branch has submitted the attached matters (Atchs 2, 3) for your consideration prior to taking final action in this case. Rule for Courts-Martial 1107(b)(3)(A)(iii) provides that you consider these matters before taking final action in this case.
>
> *I reviewed the attached clemency matters submitted by the defense. I recommend that you approve the findings and sentence as adjudged.*

(Emphasis added.) Even compared to the minimal SJA response found acceptable by our superior court in *Catrett*, we find the SJA's response in appellant's case falls short. Were we to approve this language as minimally meeting the requirements in a case where legal error is alleged, we would in effect render meaningless the provisions of R.C.M. 1106(d)(4).

We find the SJA erred in failing to respond to the appellant's allegations of legal error. Having found error, we must now test for prejudice. *United States v. Hill*, 27 M.J. 293, 296-97 (C.M.A. 1988). This type of error usually will be considered prejudicial and will require remand for a new SJAR and action. *Id.* at 296. If, however, we are "convinced that, under the particular circumstances, a properly prepared recommendation would have no effect on the convening authority's exercise of discretion-the burden in this regard being on the Government-remand to the convening authority is unnecessary." *Id*.

Based on the appellant's clemency submissions, it does not appear he was injured or attacked while in confinement. His fear was speculative, based on second-hand information. There is no indication appellant was refused assistance or that he even requested assistance from confinement officers or military officials; rather, his situation apparently was addressed when another inmate notified confinement officers about threats made by the "unstable" inmate. The appellant even acknowledged some beneficial aspects to his time in confinement. In addition, there is no dispute the convening authority considered the appellant's post-trial clemency submissions before

taking action. Under the circumstances, we are convinced that a properly prepared recommendation would have no effect on the convening authority's discretion and therefore no effect on the appellant's approved sentence.

Conclusion

The approved findings and sentence 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 sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS
Clerk of the Court