**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

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**UNITED STATES**

**v.**

**Airman Basic BRANDON A. BROWN**
**United States Air Force**

**ACM S31514**

**12 March 2009**

Sentence adjudged 02 July 2008 by SPCM convened at Eielson Air Force Base, Alaska. Military Judge: Dawn Eflein (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and forfeiture of $850.00 pay for 5 months.

Appellate Counsel for the Appellant: Major Shannon A. Bennett and Dwight H. Sullivan, Esquire.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Naomi N. Porterfield.

Before

WISE, BRAND, and HELGET
Appellate Military Judges



PER CURIAM:

In accordance with his pleas, the appellant was found guilty of one specification of damaging non-military personal property, and two specifications of larceny, in violation of Articles 109 and 121, UCMJ, 10 U.S.C. §§ 909, 921. The approved sentence consists of a bad-conduct discharge, confinement for five months, and forfeiture of $850.00 pay for five months.

The appellant asserts two assignments of error before this Court: (1) a new convening authority Action is required where the Staff Judge Advocate (SJA) did not serve the Addendum to the Staff Judge Advocate Recommendation (SJAR) on the

defense counsel and that Addendum to the SJAR included "new matter" that the defense could have rebutted and (2) this Court should modify the approved "forfeiture of $850.00 pay for five months" to forfeiture of $858.00 pay for one month to ensure that the approved sentence is correctly executed.

*Background*

On the night of 25 October 2007 and into the early morning hours of 26 October 2007, the appellant was drinking with Airman First Class (A1C) NR in the appellant's on-base residence on Eielson Air Force Base, Alaska. At some point, A1C NR mentioned that he had previously vandalized cars in the Communications Squadron dormitory parking lot and started talking about breaking into cars in the Maintenance Squadron dormitory parking lot. The appellant agreed to go with A1C NR.

A1C NR drove his car to the Maintenance Squadron dormitory parking lot with the appellant in the passenger seat. When they arrived, both the appellant and A1C NR got out of the car and illegally entered several vehicles parked in the lot. A1C NR stole a .44 caliber Ruger Magnum Revolver and a compact disc case containing 67 compact discs, and placed the items in his car. A1C NR also attempted to remove a car stereo from a 2002 Ford Explorer Sport Trac vehicle. In the course of this attempted larceny, A1C NR cracked the vehicle's console. The damage to the vehicle was $151.80.

During the course of the larcenies, A1C NR asked the appellant to drive his car closer to him as he had moved some distance away from the car. The appellant started driving the car, but he lost control and it slid into a ditch. A1C NR then took the stolen items from his car and put them in an unlocked car that was covered with snow. Later that morning, the appellant and A1C NR decided to cover up their actions by reporting that A1C NR's car had been stolen.

*Staff Judge Advocate's Recommendation*

The appellant asserts that the Addendum to the SJAR contains "new matter" necessitating a new convening authority Action. In the appellant's clemency submission, the trial defense counsel stated that the appellant had taken full responsibility for his actions and highlighted the fact that the appellant had made full restitution to A1C JS for the damage to his 2002 Ford Explorer. In response, the SJA made the following comment in the Addendum to the SJAR:

> Additionally, Capt [KA] states that [the appellant] has taken full responsibility for his criminal actions and he highlights the fact that [the appellant] paid A1C [JS] $151.80 for the damage that he did by vandalizing A1C [JS's] vehicle. However, this was the least expensive item that [the appellant] pled guilty to damaging or stealing and there is no indication that

> [the appellant] has attempted to pay restitution to his other victims or that he has plans to do so in the future.

The SJA did not serve the Addendum on the defense and no clemency was granted.

"Whether matters contained in an addendum to the SJAR constitute 'new matter' that must be served upon an accused is a question of law that is reviewed de novo." *United States v. Scott*, 66 M.J. 1, 3 (C.A.A.F. 2008) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). When making these comments in an Addendum, the SJA cannot introduce "new matter" without triggering a requirement for service of the Addendum on the accused and his counsel. Rule for Courts-Martial (R.C.M.) 1106(f)(7).

Under the Discussion to R.C.M. 1106(f)(7) it states "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed. 'New matter' does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation."

The appellant asserts that the Addendum to the SJAR should have been served on the defense because it contained "new matter." The appellant claims the SJA misadvised the convening authority by indicating that the appellant paid A1C JS for "the damage that he did by vandalizing A1C [JS]'s vehicle" when, in fact, it was A1C NR who actually damaged the vehicle. Although it was A1C NR who actually damaged A1C JS's vehicle, the appellant pled guilty to damaging the Ford Explorer because of his own involvement in the commission of the offense. Accordingly, the SJA's comments were neither inaccurate nor misleading.

The appellant also asserts that the SJA's discussion of restitution to the other two victims constitutes "new matter" because it introduced an issue not previously discussed. Additionally, the appellant asserts the SJA's advice was misleading because authorization already had been given to return the stolen property to the victims two days before the Addendum was signed. While recognizing that the Discussion to R.C.M. 1106(f)(7) is non-binding, our superior court has nonetheless cited with approval its illustrations of what is and is not "new matter." *Scott,* 66 M.J. at 3. The appellant's case falls within the "is not" category. The alleged "new matter" does not comment about new court decisions, evidence from outside the record, or an issue not previously discussed by the parties. The SJA was only responding to the restitution issue raised by the appellant in his clemency submission. Further, although authorization had been given to return the stolen items to the other two victims, the SJA's comments were not misleading because restitution is a separate issue than the return of stolen property. Although the failure to make restitution is less aggravated if the victims' stolen property has been returned, the need to make restitution may not necessarily have been completely negated.

Accordingly, we find that the Addendum to the SJAR did not contain "new matter" that must have been served on the appellant.

*Erroneous Sentence Announcement*

When a court-martial sentences an accused to forfeitures, the amount is to be stated in whole dollars per month with the number of months the forfeitures will last. R.C.M. 1003(b)(2); *United States v. Johnson*, 32 C.M.R. 127, 128 (C.M.A. 1962). In this case, the forfeitures were announced as "$850.00 pay per month for seven months." However, the duration of the forfeitures was not specified in the Action. Therefore, the duration shall not exceed one month. *United States v. Jones,* 60 M.J. 964, 972 (A.F. Ct. Crim. App. 2005) (citations omitted).

*Conclusion*

We affirm only so much of the sentence as provides for a bad-conduct discharge, five months confinement, and forfeiture of $850 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 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 sentence, as modified, are

AFFIRMED.

OFFICIAL


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