UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman BRANDON BURKS
United States Air Force

ACM S31490

19 February 2009

Sentence adjudged 06 March 2008 by SPCM convened at MacDill Air Force Base, Florida. Military Judge: Le Zimmerman (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $898.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Major Shannon A. Bennett, Major David P. Bennett, Captain Phillip T. Korman, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain G. Matt Osborn.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

PER CURIAM:

In accordance with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one specification of conspiracy to commit assault and battery, one specification of using provoking words, one specification of assault with a dangerous weapon, one specification of assault consummated by a battery, and one specification of carrying a concealed weapon, in violation of Articles 81, 117, 128, and 134, UCMJ, 10 U.S.C. §§ 881, 917, 928, 934. The military judge sentenced the appellant to a bad-conduct discharge, six months confinement, forfeitures of $1000 a month for six months, and a reduction to E-1.

The convening authority approved the bad-conduct discharge, the confinement, the reduction in rank, and forfeitures of $898 a month for six months. On appeal the appellant asks the Court to remand his case for new post-trial processing. The basis for his request is that he opines: (1) the Staff Judge Advocate Recommendation (SJAR) erroneously summarized his service record when it failed to include his deployment to Manas Air Base, Kyrgyzstan, and (2) his sentence, which includes a bad-conduct discharge, is inappropriately severe.* Finding no prejudicial error, we affirm.

Background

On 14 September 2007, the appellant attended a going-away party in Hillsborough County, Florida with his friend, Airman First Class (A1C) MF. A1C MF and A1C JR got into a confrontation at the party, and a non-commissioned officer told the appellant and A1C MF to leave the party. Both complied. Outraged, as they left the party, they discussed the idea of taking revenge on A1C JR. A short while later, the appellant retrieved a loaded handgun from his apartment and concealed the handgun in his pants.

The appellant and A1C MF returned to the party whereupon the appellant brandished his handgun at and yelled expletives to the partygoers. That night the appellant's altercation ended without further incident. The next day, the appellant and A1C MF saw A1C JR inside the appellant's apartment complex and a fight ensued. During the fight, the appellant punched A1C JR in the mouth and chest. At trial, the appellant providently pled to and was found guilty of the offenses.

On 27 March 2008 and 22 April 2008, the staff judge advocate provided her SJAR and addendum to her SJAR to the convening authority. Despite the record of trial being replete with evidence of the appellant's deployment to Manas Air Base, Kyrgyzstan, the staff judge advocate failed to include such on the appellant's personal data sheet and failed to make mention of such in her SJAR and addendum. The trial defense counsel failed to highlight this error in his petition for clemency.

SJAR

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 Courts-Martial (R.C.M.) 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005). "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

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

M.J. at 65). While the threshold for establishing prejudice is low, the appellant must nevertheless make a "colorable showing of possible prejudice." *Id.* at 437.

The Manual for Courts-Martial mandates that the SJAR include a summary of an accused's military record. R.C.M. 1106 (d)(3)(C). This Court recently held, albeit in an unpublished opinion, that a meaningful "summary" of the appellant's military record includes references to deployments, and barring such references, there is at least an obligation not to mislead the convening authority about the appellant's deployment(s). *United States v. Lavoie*, ACM S31453 (A.F. Ct. Crim. App. 21 Jan 2009). We are still of this opinion. In the case at hand, the staff judge advocate failed to reference the appellant's deployment to Manas Air Base, Kyrgyzstan in her SJAR and addendum, and in so doing, erred. Moreover, given the extensive evidence of the appellant's deployment in the record of trial, the error is plain.

However, this does not end our inquiry. To be entitled to relief, the appellant must show prejudice. In this regard, he has failed. First, though the staff judge advocate failed to make reference to the appellant's deployment, in her addendum she did advise the convening authority that before taking action he must consider the matters submitted by the appellant. Among those matters were clemency requests from the appellant and his trial defense counsel wherein they specifically mentioned the appellant's deployment. Moreover, the convening authority acknowledged that he considered the matters submitted by the appellant prior to taking action. Thus, notwithstanding the staff judge advocate's error, the convening authority was aware of and considered the appellant's deployment prior to taking action. Lastly, the appellant has failed to make a colorable showing of possible prejudice.

Inappropriately Severe Sentence

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005). We make such determinations in light of the character of the offender, the nature and seriousness of his offense, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *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). Additionally, while we have a great deal of discretion in determining whether a particular sentence is appropriate, we are not authorized to engage in exercises of clemency. *United States v. Lacy*, 50 M.J. 286, 288 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Dodge*, 59 M.J. 821, 829 (A.F. Ct. Crim. App. 2004), *aff'd in part and rev'd in part on other grounds*, 60 M.J. 368 (C.A.A.F. 2004).

In this case, the appellant, by his actions, seriously compromised his standing as a military member. While we applaud him for accepting responsibility for his actions, his acceptance of responsibility and otherwise spotless record does not minimize the seriousness of his crimes. After carefully examining the submissions of counsel, the

appellant's military record, and taking into account all the facts and circumstances surrounding the offenses of which the appellant was found guilty, we do not find the appellant's sentence inappropriately severe.

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, YA-02, DAF
Clerk of the Court