UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class LOUANDRE H. CARDENAS
United States Air Force

ACM S30333

29 April 2005

Sentence adjudged 27 February 2003 by SPCM convened at Sheppard Air Force Base, Texas. Military Judge: Kurt D. Schuman.

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

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Captain Stacey J. Vetter.

Before

MALLOY, JOHNSON, and GRANT
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

JOHNSON, Judge:

In accordance with his plea, the appellant was convicted of absence without leave (AWOL), in violation of Article 86, UCMJ, 10 U.S.C. § 886. A panel of officer members sentenced the appellant to a bad-conduct discharge and reduction to E-1. The convening authority approved the sentence as adjudged. The appellant raises two errors for our consideration: (1) Whether the appellant is entitled to a new post-trial review and action where there is no evidence the convening authority considered the appellant's clemency matters; and (2) Whether the military judge materially prejudiced the appellant's substantial rights when he did not address the court members' concerns about the availability of an administrative discharge. We find no error and affirm.

Background

The facts in this case are simple. The appellant graduated from technical school and was granted leave. Instead of reporting to his first duty assignment at Mountain Home Air Force Base, Idaho, when his leave ended, the appellant chose to stay in Dallas, Texas, for an additional 64 days before turning himself in to military authorities.

Post-Trial Review

The first issue the appellant raises is whether he is entitled to meaningful sentence relief or a new post-trial review and action where there is no evidence that the convening authority considered his clemency submission. The convening authority must consider matters submitted by an accused before taking action on the sentence. Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2). We will presume a convening authority has done so if the staff judge advocate (SJA) prepared an addendum to the staff judge advocate's recommendation (SJAR) that: (1) tells the convening authority of the matters submitted; (2) advises the convening authority that he must consider the matters; and (3) lists the attachments, indicating they were actually provided. *United States v. Gaddy*, 54 M.J. 769, 773 (A.F. Ct. Crim. App. 2001) (citing *United States v. Foy*, 30 M.J. 664 (A.F.C.M.R. 1990)). In the case sub judice, the SJA prepared an addendum that adequately advised the convening authority. However, the addendum also contained language advising the convening authority as follows: "TO DOCUMENT THE FACT YOU HAVE CONSIDERED AB CARDENAS' CLEMENCY MATTERS, PLEASE INITIAL IN THE TOP RIGHT CORNER OF EACH PAGE OF EACH DOCUMENT INCLUDED IN ATTACHMENT 3." The convening authority's initials do not appear on any of the appellant's submitted matters.

Appellate government counsel has submitted two affidavits; one from the servicing SJA and one from the convening authority. The SJA has no doubt that the clemency matters were provided and that the convening authority considered the clemency matters before taking action on this case. The convening authority, who did not have a specific recollection of this case, indicated if the package was assembled as indicated in the addendum, he would have reviewed and considered the clemency matters. We find it difficult to fathom a situation where a conscientious convening authority reads this addendum and would not notice that a substantial part of the package (31 pages) was missing. It appears the matters were provided to the convening authority and he merely neglected to initial each page of the matters. While we are convinced that this convening authority considered the clemency matters, we caution the staff judge advocate. If an SJA, sua sponte, implements an additional "fail-safe" procedure (i.e. initialing) to ensure the convening authority reviews clemency matters, then that SJA should ensure that the convening authority complies with this procedure in each case.

Military Judge's Response to Court Members' Question

The second issue the appellant asserts is whether the military judge materially prejudiced the appellant's substantial rights when he did not address the court members' concern about the availability of an administrative discharge in the event they did not adjudge a punitive discharge. In the appellant's written unsworn statement, he indicated his commander and first sergeant did not support a bad-conduct discharge. Further, he informed them that if the members did not punitively discharge him, his commander would administratively discharge him. Finally, the appellant compared his case to other similar cases and the punishments levied in those. The trial judge addressed these issues in the sentencing instructions. Essentially, he explained that the matters raised by the appellant's unsworn statement are collateral and they should not concern themselves with these matters. Trial defense counsel did not object to the judge's instructions.

Failure to object to sentencing instructions at trial waives the issue on appeal absent plain error. *United States v. Hall*, 46 M.J. 145, 146 (C.A.A.F. 1997). To establish plain error, the appellant must show there was error, the error was "plain, clear, or obvious," and the error affected the appellant's substantial rights. *Hall*, 46 M.J. at 147.

Furthermore, our superior court has held that collateral consequences of a court-martial conviction should not be the concern of a court-martial. *Hall*, 46 M.J. at 146. However, "[w]hen an accused uses his virtually unrestricted unsworn statement to raise issues for the members to consider, the military judge does not err in providing the court members accurate information on how to appropriately consider those matters in their deliberations." *United States v. Friedmann*, 53 M.J. 800, 803-04 (A.F. Ct. Crim. App. 2000). *See also United States v. Grill*, 48 M.J. 131, 132 (C.A.A.F. 1998). In *Grill*, our superior court recognized that a military accused might attempt to confuse the members during the unsworn statement, but expressed confidence that military judges could adequately resolve any confusion by appropriately tailoring the sentencing instructions. *Id*.; *Friedmann*, 53 M.J. at 804. This is exactly what happened in this case. The appellant provided information about what his commander and first sergeant thought was not an appropriate sentence and how others were punished for the offense of AWOL. Clearly this was confusing to the members in that, after an hour of deliberating, the president specifically asked the trial judge the following:

> Your Honor, based on comments made in the defendant's written statement, it implies that administrative discharge is certain if a Bad Conduct Discharge is not given by this Court. Is it an option of the accused's commanders to proceed with administrative discharge proceedings if we do not give a Bad Conduct Discharge, or does the -- by us saying that we have decided to retain the member by not giving a Bad

> Conduct Discharge, does that then prevent the commander from further -- from administratively discharging the member?

To which the trial judge responded with the following instructions:

> As I tried to tell you earlier, retention of the accused on active duty is not an issue that's before the Court. The issue that's before you with regard to the Bad Conduct Discharge, is whether or not his conduct, the criminal activity, does that deserve to be punished with a Bad Conduct Discharge, okay? Now, there are a number of things that would come into play as far as retention goes. There are a number of different things that can be accomplished, but those are not matters that are before you as court members.

As a result, we find no error.

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

ANGELA M. BRICE
Clerk of Court