UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSEPH D. CASAREZ
United States Air Force

ACM S31160

5 October 2007

Sentence adjudged 13 July 2006 by SPCM convened at Dyess Air Force Base, Texas. Military Judge: Bryan Watson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 75 days, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, and Major Chadwick A. Conn.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Matthew S. Ward, and Major Donna S. Rueppell.

Before

JACOBSON, PETROW, and ZANOTTI
Appellate Military Judges

OPINION OF THE COURT

ZANOTTI, Judge:

A military judge sitting alone as a special court-martial found the appellant guilty, pursuant to his pleas, of one specification of failure to go, one specification of wrongful use of cocaine, and one specification of incapacitation for the proper performance of his duties through wrongful previous overindulgence in intoxicating liquor or drugs, in violation of Articles 86, 112a, and 134, 10 U.S.C. §§ 886, 912a, 934. His adjudged and approved sentence consists of a bad-conduct discharge, confinement for 75 days, and reduction to E-1. The appellant argues for sentence relief because there was no evidence the convening authority considered the defense counsel's objection to the Staff Judge Advocate's Recommendation (SJAR) submitted in clemency prior to taking action.

We review post-trial processing matters de novo. *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Prior to taking final action, the convening authority must consider clemency matters submitted by the accused. Article 60(b)(1), UCMJ, 10 U.S.C. § 860(b); Rule for Courts-Martial (R.C.M.) 1107(b)(3)(A)(iii); *United States v. Craig*, 28 M.J. 321, 325 (C.M.A. 1989).

We agree that error occurred. The Staff Judge Advocate's Addendum to the SJAR, dated 23 August 2006, lists attachments. Included in the list is the appellant's request for clemency, his trial defense counsel's request for clemency, and a "Waiver of Additional Days to Submit Clemency Matters." These documents were all dated 22 August 2006. The Addendum includes the instruction pursuant to R.C.M. 1107 that the convening authority must consider the documents before taking action. The convening authority confirmed on 23 August 2006, by first indorsement to the staff judge advocate, that he had considered the attached submission. He did not initial any of the documents reviewed, however. Trial defense counsel's letter, "Objection to SJA Recommendation, *SrA Joseph D. Casarez*," is dated 22August 2006, and is omitted from the Addendum's list. There is no explanation as to why this document was not included on the list of attachments, though it is dated the same as the other defense submissions. Accordingly, we cannot tell if the trial defense counsel's objections to the SJAR had in fact been reviewed, and there is no presumption of regularity which we can rely upon to conclude that the document was reviewed. *United States v. Foy*, 30 M.J. 664, 666 (A.F.C.M.R. 1990) (identifying a presumption of regularity if defense matters are listed and attached); *United States v. Godreau*, 31 M.J. 809, 812 (A.F.C.M.R. 1990) (finding proper review of defense matters submitted if they are initialed and dated by the convening authority even in the absence of addendum listing defense submissions). Speculation is prohibited. *United States v. Bakcsi*, 64 M.J. 544, 545 (A.F. Ct. Crim. App. 2006) (citing *Craig*, 28 M.J. at 325).

In response to appellate defense counsel's brief on the issue, appellate government counsel submitted an affidavit by the convening authority, another approved procedure for demonstrating compliance with R.C.M. 1107. *Godreau*, 31 M.J. at 812. It outlines the convening authority's standard operating procedure for post-trial review. It is unhelpful to us in resolution of the issue before us because, standard procedures aside, it establishes only that the convening authority reads what is given to him. The issue before us is the analysis of whether a document has been omitted. The affidavit does not establish that the convening authority actually reviewed the apparently omitted document, which it, or some other method of proof, must do. *Id.*; *Bakcsi*, 64 M.J. at 545.

We now examine the record for prejudice. In the affidavit, the convening authority states that the he re-examined all submissions, including the apparently omitted document. The documents he reviewed are attached to the affidavit, among them trial defense counsel's objections to the SJAR. The convening authority states: "After a careful re-examination of the above information, to include all the attachments to this affidavit, my decision to approve the sentence as indicated in the action has not changed." Accordingly, we find no prejudice. *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998).

Conclusion

We have examined the record of trial, the assignment of error, and the government's reply thereto. We conclude the findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant was committed. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). On the basis of the entire record, the findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, GS-11, DAF
Clerk of the Court