UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class JASON K. COLKMIRE
United States Air Force

ACM S31564

25 January 2010

Sentence adjudged 12 August 2008 by SPCM convened at Ramstein Air Base, Germany. Military Judge: Jennifer L. Cline (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, forfeiture of $800.00 pay per month for 4 months, and reduction to E-1.

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

Appellate Counsel for the United States: Colonel Douglas P. Cordova, Lieutenant Colonel Jeremy S. Weber, and Captain Michael T. Rakowski.

Before

BRAND, JACKSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one charge and specification of possession of psilocybin mushrooms, a Schedule I controlled substance, and another specification of use of marijuana, and one charge and specification of wrongfully leaving the scene of an accident, in violation of Articles 112a and 134, UCMJ, 10 U.S.C. §§ 912a, 934.[1] During

---

[1] Pursuant to a pretrial agreement, two additional charges were withdrawn and dismissed with prejudice. The convening authority agreed to limit confinement to five months with no other restrictions on sentencing.

the trial, the military judge sentenced the appellant to a bad-conduct discharge, reduction to E-1, confinement for five months, and forfeitures of $1,000 pay per month for four months. Prior to authentication of the record, the military judge realized the announced forfeitures were incorrectly calculated based upon the rank of E-3 as opposed to the appellant's reduced rank of E-1. The military judge notified the parties of the erroneous announcement of sentence. Pursuant to Rule for Courts-Martial (R.C.M.) 1007(b), she proposed the court-martial be called back into session to correct the announcement of sentence or, in the alternative, that she attach a notice of error to the record of trial and request that the convening authority approve forfeitures which do not exceed the maximum allowable forfeitures. The appellant and his counsel concurred with the correction and waived the requirement that the court-martial be called back into session to correct the announcement of sentence. The military judge issued an Order to Correct the Erroneous Announcement of Sentence, reflecting forfeitures of $800 pay per month for four months. After being advised of the military judge's erroneous announcement of sentence and her subsequent correction to the adjudged forfeitures, the convening authority approved a sentence of a bad-conduct discharge, reduction to E-1, confinement for five months, and forfeitures of $800 pay per month for four months.

The appellant asserts three errors: (1) the military judge impermissibly modified the illegal sentence of adjudged forfeitures, which exceeded the maximum allowable forfeitures, by reducing the forfeitures post-trial; (2) the staff judge advocate recommendation (SJAR) erred in failing to advise the convening authority of his options regarding the military judge's imposition of illegal forfeitures; and (3) the bad-conduct discharge is inappropriately severe.[2] The appellant requests that this Court set aside the approved forfeitures of $800 pay per month for four months and the bad-conduct discharge, set aside the convening authority's action and order new post-trial processing, or provide other meaningful relief. Finding no error, we do not concur. This Court affirms the findings and sentence.

Sentencing Announcement

The appellant asserts that the military judge erred in relying upon R.C.M. 1007(b) and that the order correcting the announcement of sentence was in fact an impermissible reconsideration of the sentence, an unlawful proceeding in revision, or an invalid increase in the appellant's original sentence.[3] These objections were not brought to the attention of the military judge when she notified the parties of the erroneous announcement of sentence. Nor were they brought to the attention of the convening authority when the appellant submitted his response to the SJAR during clemency. Thus, there is a threshold

[2] The third issue is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).
[3] The appellant cites Rule for Courts-Martial (R.C.M.) 1009; Article 60, UCMJ, 10 U.S.C. § 860; and *United States v. Baker*, 32 M.J. 290, 290 (C.M.A. 1991) (holding that it is improper to reconvene a court-martial to *increase* the sentence following announcement).

issue of whether the appellant expressly waived the right to challenge these issues on appeal or whether he merely forfeited the issues.

"A forfeiture is basically an oversight; a waiver is a deliberate decision not to present a ground for relief that might be available in the law." *United States v. Campos*, 67 M.J. 330, 332 (C.A.A.F. 2009) (quoting *United States v. Cook*, 406 F.3d 485, 487 (7th Cir. 2005)). A forfeiture is reviewed for plain error, while a valid waiver leaves no issues to be corrected on appeal. *Id.* With that said, the Rules for Courts-Martial provide that a failure to timely comment on matters in the SJAR or on matters attached to the SJAR waives any later claim of error in the absence of plain error. R.C.M. 1106(f)(6); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

We find the appellant affirmatively waived his right to assert that the military judge erred in her application of R.C.M. 1007(b) to correct the erroneous announcement of sentence. The military judge unambiguously informed the parties, "If the accused does not desire this post-trial session for this limited purpose or to otherwise seek any other relief/remedy, the accused may waive his right." The appellant and his counsel expressly waived his rights by written response. The signed waiver acknowledged the erroneous sentence and the corrected sentence imposed by the military judge pursuant to R.C.M. 1007(b) and waived the right under that same rule to go back into open session to announce the corrected sentence. No issues were raised with the military judge. Thus, the waiver constituted an intentional relinquishment of a known right. *See Campos*, 67 M.J. at 332 (finding waiver when the defense entered into a stipulation of expected testimony and did not object to its admission at trial when the military judge asked if there were any objections). However, assuming, arguendo, that the waiver was not an intentional relinquishment of a known right, we will examine the issues for plain error.

Regarding the appellant's failure to raise any objections to the SJAR, we conclude this too was waived. Neither the appellant nor his counsel raised any objections to the military judge's correction order which the staff judge advocate discussed in his recommendation to the convening authority. In fact, both the appellant and his counsel highlighted the waiver in the clemency submissions as partial justification for the convening authority to reduce the confinement by twelve days. Thus, it is clear the issue was affirmatively waived. However, despite the holding in *Campos* regarding waiver and its impact on appeals, we note that the Rules for Courts-Martial allow this Court to review this waiver for plain error. R.C.M. 1106(f)(6). Thus, we will examine the issue regarding the advice to the convening authority for plain error as well.

In order to prevail under a plain error analysis, the appellant must show: "(1) there was an error; (2) it was plain or obvious; and (3) the error materially prejudiced a substantial right [of the appellant]." *Scalo*, 60 M.J. at 436 (quoting *United States v. Kho*, 54 M.J. 63, 65 (C.A.A.F. 2000)). Although the threshold for establishing prejudice in

this context is low, the appellant must nonetheless make at least "some colorable showing of possible prejudice." *Id.* at 436-37.

An erroneous announcement of sentence is governed by R.C.M. 1007(b) which provides as follows:

> If the announced sentence is not the one actually determined by the court-martial, the error may be corrected by a new announcement made before the record of trial is authenticated and forwarded to the convening authority. This action shall not constitute reconsideration of the sentence. If the court-martial has been adjourned before the error is discovered, the military judge may call the court-martial into session to correct the announcement.

R.C.M. 1007(b); *United States v. Spaustat*, 57 M.J. 256, 260-61 (C.A.A.F. 2002).[4] It is well settled law that a sentence may not be increased following the announcement of sentence. *United States v. Baker*, 32 M.J. 290, 290 (C.M.A. 1991). However, as noted by our sister court, R.C.M. 1007(b) provides the legal authority to correct an erroneous announcement of a sentence when the result is a decrease in the adjudged punishment. *United States v. Quintero*, 54 M.J. 562, 565 n.2 (Army Ct. Crim. App. 2000). Further, the convening authority is granted the power to "approve, disapprove, commute or suspend the sentence in whole or in part," to correct any errors in the sentence and to approve a sentence that is lawful. Article 60(c)(2), UCMJ, 10 U.S.C. § 860(c)(2); *United States v. Gaston*, 62 M.J. 404, 408 (C.A.A.F. 2006).

In the case at hand, it is clear from the record that the military judge erroneously announced forfeitures based on the pay of an E-3 versus the pay of an E-1. As noted in the order signed by the military judge, this was purely a calculation error. When the military judge reviewed the record prior to authentication, she identified the issue and notified the parties. The record clearly indicates the forfeitures announced were not the forfeitures which the military judge actually intended to announce. The military judge was not reconsidering the sentence, she was merely correcting the announcement. The correction did not increase the punishment, but clearly decreased the amount of forfeitures. We conclude the military judge took the appropriate actions to correct the announcement of the sentence.

[4] Reconsideration of a sentence or clarification of an ambiguous sentence is governed by R.C.M. 1009. This is not a case where the sentence was reconsidered or where the announced sentence was ambiguous. Here, the military judge merely miscalculated the forfeitures. "As the sentencing authority, a military judge is presumed to know the law and apply it correctly absent clear evidence to the contrary." *United States v. Bridges*, 66 M.J. 246, 248 (C.A.A.F. 2008); *see also United States v. Erickson*, 65 M.J. 221, 225 (C.A.A.F. 2007). Based on our review of the entire record of trial, we conclude the military judge knew the law and the announcement of the sentence at trial was merely an erroneous announcement properly governed by the procedures of R.C.M. 1007(b).

However, even if it was error for the military judge to rely on R.C.M. 1007(b), we nevertheless conclude that she could have directed post-trial proceedings in revision in accordance with R.C.M. 1102(b)(1).[5] This rule provides: "Proceedings in revision may be directed to correct an apparent error, omission, or improper or inconsistent action by the court-martial, which can be rectified by reopening the proceedings without material prejudice to the accused." R.C.M. 1102(b)(1). The discussion to this rule suggests one example for such proceedings is to correct an apparently illegal action by the court-martial. Without a doubt, the forfeitures announced during trial in this case exceeded the maximum forfeitures.[6] Whether the military judge referred to R.C.M. 1007(b) or R.C.M. 1102(b)(1), she took the steps authorized to correct the miscalculated forfeitures. She notified the parties that she intended to reopen the trial to correct the announcement of forfeitures. The appellant waived the reopening of the proceedings. The military judge issued her order correcting the sentence to include forfeitures of $800 pay per month for four months. Clearly, the appellant was not materially prejudiced. Thus, even if the military judge had referenced R.C.M. 1102(b)(1), we find her actions in correcting the sentence to be appropriate and authorized.

In review of the entire record and as set forth above, we find no error, let alone plain error. Even assuming, arguendo, that there was error, the appellant was not prejudiced. The appellant's forfeitures were *decreased* when the military judge corrected the erroneous announcement of sentence. Finally, pursuant to his authority under Article 60, UCMJ, the convening authority took action on this case after notification of the military judge's corrective order. We do not concur with the appellant's assertion that the staff judge advocate erred in his recommendation. It was quite clear that the convening authority was properly advised of his options regarding sentencing. After review of the entire record, the convening authority approved a sentence which included a bad-conduct discharge, reduction to E-1, confinement for five months, and forfeitures of $800 pay per month for four months. We find the appellant has failed to establish plain error.

Sentence Appropriateness of a Bad-Conduct Discharge

We review sentence appropriateness de novo. *United States v. Baier*, 60 M.J. 382, 383-84 (C.A.A.F. 2005); *United States v. Christian*, 63 M.J. 714, 717 (A.F. Ct. Crim. App. 2006), *aff'd in part*, 66 M.J. 291 (C.A.A.F. 2008). We "may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as [we find] correct in law and fact and determine[], on the basis of the entire record, should be approved." Article 66(c), UCMJ, 10 U.S.C. § 866(c). We make such determinations in light of the character of the offender, the nature and seriousness of his offenses, and the entire record of trial. *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982); *United*

---

[5] For example, the military judge could have directed post-trial proceedings if the record was not clear enough to establish the forfeitures of $800 were the forfeitures she actually intended to announce per R.C.M. 1007(b).
[6] The maximum monthly forfeitures for an E-1 was $898.

States v. Bare, 63 M.J. 707, 714 (A.F. Ct. Crim. App. 2006). 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, 287-88 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

The appellant asserts the bad-conduct discharge is inappropriately severe. We do not concur. In this case, the appellant traveled to the Netherlands with two unwitting airmen in order to purchase psilocybin mushrooms. He planned the purchase, procured supplies to conceal his purchase, and slipped away from the two airmen as they were eating at a restaurant in the Netherlands. The appellant purchased three containers of the mushrooms from a local storekeeper and hid the mushrooms in his vehicle without revealing his drug stash to his two friends. While returning to Germany, the trio was stopped by the local police for a customs search and the drugs were found hidden in the trunk panel. The local police questioned the appellant and the two other airmen. After realizing his friends were suspected of drug possession too, he confessed and told the police his friends were not involved.

Months later, the appellant went to an off-base club where he smoked marijuana with a friend. A few days later, the appellant lost control of the vehicle he was driving and crashed into a local national's vehicle which was parked on the street. He fled the scene without leaving any contact information or reporting the accident. When the local police arrived at his off-base home, he refused their entry. Finally, after using a locksmith to unlock the door several times, as the appellant relocked the door before the door could be opened, the local police gained entry. The appellant was combative and unprofessional toward the local police. He failed a field sobriety test and later tested positive for marijuana use.

The appellant's criminal behavior was prejudicial to good order and discipline and discredited the Air Force, the unit, and the appellant himself. Not only did the appellant involve two fellow airmen in his criminal activities, but he also victimized a foreign national when he fled the scene of an accident after damaging the foreign national's vehicle. His criminal behavior continued as the local police attempted to solve the unreported accident. Finally, the appellant purchased and used illegal drugs in two of our host nation countries. His criminal behavior is unacceptable. After carefully examining the entire record, including the submissions of counsel[7] and the appellant's military record,[8] and taking into account all the facts and circumstances surrounding the offenses

---

[7] We note the appellant submitted a host of character letters from family, friends, and co-workers attesting to his good character and duty performance.

[8] In just under three years in the Air Force, the appellant received a referral performance report and three letters of counseling and two letters of reprimand for fighting in the dorms, unprofessional conduct during duty, dereliction of duty, failure to go, and derogatory racial remarks.

of which the appellant was found guilty, we do not find the appellant's sentence, one which includes a bad-conduct discharge, to be 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; *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