UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman JOSE L. CORTEZ
United States Air Force

ACM 35906

26 April 2006

Sentence adjudged 16 January 2004 by GCM convened at Hill Air Force Base, Utah. Military Judge: Jack L. Anderson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 9 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, and Major David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Major Michelle M. McCluer, and Major Lane A. Thurgood.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

We have reviewed the record of trial, the appellant's assignment of error, and the government's reply thereto. The appellant claims that the addendum to the staff judge advocate's recommendation (SJAR) in his case contained "new matter" requiring service upon him in accordance with Rule for Courts-Martial (R.C.M.) 1106(f)(7). We conclude that it did not and affirm.

The appellant received a copy of the SJAR and made a timely clemency request to the convening authority. The staff judge advocate (SJA) prepared a four-paragraph

addendum, recommending that no clemency be granted. The final paragraph of the addendum contains the following passage:

> The sentencing authority, whether military judge or court-martial panel, imposes sentences based on the facts and circumstances of the individual case, including matters in aggravation and in extenuation and mitigation. In this case, a military judge adjudged 13 months confinement, reduction to the grade of E-1, and a [bad-conduct] discharge.

The appellant complains that this language, by "obvious implication," suggested to the convening authority that he should defer to the judgment of the military judge who imposed the appellant's sentence at trial. He asks that we set aside the convening authority's action and return the record for further post-trial processing.

Whether the addendum contains "new matter" is a question of law we review de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002) (citing *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997)). An addendum containing "new matter" must be served on the accused and his counsel for comment. R.C.M. 1106(f)(7). An appellant who claims the addendum contains "new matter" must make a colorable showing of possible prejudice in order to obtain relief. *United States v. Brown*, 54 M.J. 289, 292-93 (C.A.A.F. 2000) (citing *Chatman*, 46 M.J. at 323-24).

The first sentence argued by the appellant restates, in summary form, the appellant's rights in allocution:

> MJ: [W]e now enter the sentencing phase of the trial where you have the right to present matters in extenuation and mitigation, that is, matters about the offenses or yourself which you want me to consider in deciding your sentence.

To the extent this information is contained in the record of trial it is not "new matter" requiring service on the accused. *See Chatman*, 46 M.J. at 323 (citing R.C.M. 1106(f)(7), Discussion). *See also Key*, 57 M.J. at 249 (no service required where comment "did not inject anything from outside the record"). The portion of the sentence that avers the same standards apply whether the sentencing authority is a panel of members or a military judge sitting alone is an accurate and facially neutral statement of the law, requiring no service on the appellant. *See, e.g., United States v. Jones*, 44 M.J. 242, 244 (C.A.A.F. 1996) (neutral recitation of events did not require service on the accused).

The second sentence of the purported "new matter" is substantially identical to a sentence appearing in the original SJAR: "A military judge sentenced the accused to 13 months confinement, reduction to E-1, and a [bad-conduct] discharge." The appellant

had the opportunity to respond to this sentence when it first appeared; thus, we cannot agree with his characterization of it as "new matter." Because he did not object to this sentence prior to the convening authority's action, any issue concerning it is waived, unless we find plain error. *See United States v. Wilson*, 54 M.J. 57, 59 (C.A.A.F. 2000). We find no such error here.

Having concluded that neither sentence individually merits relief, we consider whether, in tandem, they serve to deprive the appellant of the post-trial "fair play" to which he is entitled. *See United States v. Anderson*, 53 M.J. 374, 377 (C.A.A.F. 2000). There is no indication whatsoever of any malign intent on the part of the SJA in the preparation of the addendum, and we will not assume one. Nothing in the complained-of passage is inaccurate, misleading, or unfavorable to the appellant. *See Jones*, 44 M.J. at 244. Furthermore, we have evaluated the post-trial processing of the appellant's case to determine whether, taken in its entirety, the appellant's right to an independent review of the findings and sentence by the convening authority was in any way compromised. Article 60, UCMJ, 10 U.S.C. § 860. We conclude that it was not. The convening authority's responsibilities were laid out in detail in the SJAR. The SJA properly advised the convening authority that he "must consider" the appellant's clemency submissions; that he had the "sole discretion" to approve, disapprove, dismiss, modify or order a rehearing on the findings; that he could approve, disapprove mitigate, change, or order a rehearing on the sentence, but could not increase its severity; and that the exercise of this discretion was a matter of "command prerogative." The record shows that the convening authority was well aware of his responsibilities, that he considered the appellant's clemency matters, and that he acted within the scope of his authority and obligation under the law. We conclude that the appellant has failed to make a colorable showing of possible prejudice, and resolve the assignment of error adversely to him. *See Chatman*, 46 M.J. at 323-24.

The 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 findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court