

**UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS**

---

**UNITED STATES**

**v.**

**Staff Sergeant BRYAN D. CREWS  
United States Air Force**

**ACM S31748**

**30 March 2011**

Sentence adjudged 20 October 2009 by SPCM convened at McConnell Air Force Base, Kansas. Military Judge: William Burd (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 4 months, fine of \$3,000.00, to serve an additional term of confinement of 3 months if the fine is not paid, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Gail E. Crawford, Major Marla J. Gillman, Major Darrin K. Johns, Major Bryan A. Bonner, Major Anthony D. Ortiz, and Captain Daniel E. Schoeni.

Appellate Counsel for the United States: Colonel Don M. Christensen, Lieutenant Colonel Jeremy S. Weber, Major Coretta E. Gray, Major Charles G. Warren, Captain Scott C. Jansen, and Gerald R. Bruce, Esquire.

Before

**BRAND, GREGORY, and ROAN  
Appellate Military Judges**

This opinion is subject to editorial correction before final release.

**PER CURIAM:**

A special court-martial composed of military judge alone convicted the appellant in accordance with his pleas of one specification of negligent dereliction of duty, three specifications of making false official statements, and three specifications of larceny of military property in violation of Articles 92, 107, and 121, UCMJ, 10 U.S.C. §§ 892, 907, 921. The court sentenced him to a bad-conduct discharge, confinement for four months, a fine of \$3,000 with an additional three months of confinement if the fine is not paid, and reduction to the grade of E-1. The convening authority approved the sentence

adjudged. The appellant argues that (1) the military judge erred by admitting certain aggravating evidence concerning the appellant's former spouse, and (2) the staff judge advocate failed to properly respond to defense matters in his post-trial recommendations. Finding no error prejudicial to the substantial rights of the appellant, we affirm.

### *Admission of Aggravation Evidence*

The appellant and his spouse divorced on 13 July 2006. In November 2006, on a form authorizing payment of family separation allowance (FSA), the appellant falsely stated that he was still married and thereby fraudulently obtained FSA in the amount of \$1,016.67. He signed a second such form in November 2007, fraudulently obtaining \$441.67. A third FSA form signed by the appellant in May 2008 yielded him another \$925 in fraudulently obtained allowances.

Following the divorce, the appellant did not retrieve his ex-wife's military dependent identification card. His ex-wife used the card to fraudulently obtain military medical benefits and prescription medications. Over objection, the military judge admitted as aggravation evidence the ex-wife's fraudulent transactions facilitated by use of the identification card which the appellant had failed to retrieve.

Trial counsel may present aggravating evidence directly related to the offenses so long as the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. Rule for Courts-Martial (R.C.M.) 1001(b)(4); Mil. R. Evid. 403; *United States v. Stephens*, 67 M.J. 233, 235-36 (C.A.A.F. 2009), *cert. denied*, 130 S. Ct. 139 (2009). Whether a circumstance is directly related to an offense for purposes of aggravation requires considered judgment by the military judge, and the exercise of that judgment will not be overturned lightly. *United States v. Wilson*, 47 M.J. 152, 155 (C.A.A.F. 1997). We test the admission or exclusion of evidence in sentencing using an abuse of discretion standard, and any error in sentencing must materially prejudice the substantial rights of the appellant before the sentence will be found incorrect based on error. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *Stephens*, 67 M.J. at 235.

Here, the military judge found that the ex-wife's medical fraud was directly related to the appellant's failure to retrieve her military dependent identification card, but he expressly identified the "marginal value" of the evidence and stated that he would only sentence the appellant for his crimes and not those of his ex-wife. The military judge's statements taken together with the adjudged sentence clearly show that the evidence concerning the ex-spouse's use of the identification card had no prejudicial impact. Even the appellant concedes as much: "It is unclear what effect this improperly introduced evidence had on the sentence." The appellant received just one-third of the authorized confinement at this special court-martial for multiple larcenies and false statements made to defraud the United States. Under these circumstances, the aggravating evidence offered on the dereliction charge was, as the judge said, clearly marginal, and we,

therefore, find no error which substantially prejudiced the rights of the appellant. *See United States v. Sanders*, 67 M.J. 344 (C.A.A.F. 2009) (no evidence that the military judge gave significant weight to challenged aggravation evidence and, therefore, no substantial prejudice even if error).

### *Sufficiency of the Staff Judge Advocate's Recommendations*

In support of his clemency request, the appellant urged the convening authority to not punish him for the crimes of his ex-spouse, stating that much of the aggravating evidence admitted at trial concerned the fraudulent activities of the ex-spouse with the dependent military identification card that the appellant had failed to retrieve. The appellant did not describe the admission of such evidence as legal error, and summarized his appeal for clemency in this regard by stating that he “should not be held accountable for actions out of his control.” His trial defense counsel further stated: “I have reviewed the Staff Judge Advocate’s recommendation, and I do not have any objections to the content of that recommendation except as to [the appellant’s] request for clemency.” In an addendum to his earlier recommendation, the staff judge advocate stated that he had considered the defense matters and that the convening authority must do so as well.

When defense counsel alleges legal error in matters submitted to a convening authority, the staff judge advocate must state whether corrective action is required on the findings or sentence. R.C.M. 1106(d)(4). If the staff judge advocate does not respond to allegations of legal error, a reviewing court may nevertheless affirm without remand if the alleged error would not “foreseeably” have resulted in a recommendation more favorable to the appellant or corrective action by the convening authority. *United States v. Hill*, 27 M.J. 293, 297 (C.M.A. 1988). Here, the staff judge advocate apparently did not view defense counsel’s reiteration that the appellant should not be sentenced for the crimes of his ex-spouse as an allegation of legal error. The context of defense counsel’s statement in clemency supports that view.

Assuming *arguendo* that this was an allegation of legal error, we find no prejudice. First, the military judge expressly limited his sentence to the crimes committed by the appellant and not those committed by his ex-spouse. Second, the staff judge advocate considered defense counsel’s plea that the appellant not be sentenced for the crimes of his ex-spouse and recommended approval of the sentence adjudged by the military judge. Third, the convening authority considered the defense submissions as well before approving the adjudged sentence. Fourth, the approved sentence is entirely appropriate for the appellant’s crimes. Therefore, any error in not specifically addressing the matter would not have foreseeably resulted in more favorable action.

*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



A handwritten signature in blue ink, appearing to read "S. Lucas", is written over a faint, light blue circular stamp or watermark.

STEVEN LUCAS  
Clerk of the Court