UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman NICOLAS A. DAUGHERTY
United States Air Force

ACM 36542

25 July 2007

Sentence adjudged 12 October 2005 by GCM convened at Pope Air Force Base, North Carolina. Military Judge: Gary Jackson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 18 months, a fine of $13,736.00 with additional confinement for six months if not paid, forfeiture of all pay and allowances, reduction to E-1, and a reprimand.

Appellate Counsel for Appellant: (argued), Colonel Nikki A. Hall, Lieutenant Colonel Mark R. Strickland, Captain Anthony D. Ortiz, and Captain Griffin S. Dunham.

Appellate Counsel for the United States: (argued), Colonel Gerald R. Bruce, Major Matthew S. Ward, Captain Daniel J. Breen, and Captain Jamie L. Mendelson.

Before

SCHOLZ, JACOBSON, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

SCHOLZ, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, in accordance with his plea, of one specification of larceny in violation of Article 121 UCMJ, 10 U.S.C. § 921. The appellant's approved sentence consists of a dishonorable discharge, confinement for 18 months, a fine of $13,736.00 with confinement for an

additional 6 months if the fine was not paid within 30 days, forfeiture of all pay and allowances, reduction to the grade of E-1, and a reprimand. [1]

On appeal the appellant asserts he should be entitled to new post-trial processing because he was denied an opportunity to respond to new matter raised in the addendum to the staff judge advocate's recommendation (SJAR) to the convening authority. The appellant specifically alleges the staff judge advocate (SJA) incorrectly advised the convening authority that an adjudged fine should be viewed solely as punishment and not as recoupment of losses.

We disagree and affirm. However, we find the appellant's sentence is inappropriately severe and grant relief in the form of a sentence modification.

Background

The appellant worked in the comptroller's office at Pope Air Force Base, North Carolina. Beginning in October of 2004, he implemented a scheme to steal money from the Air Force by using the routing number for his own bank account when processing travel claims for airmen who were changing duty stations. After securing each payment for himself, the appellant resubmitted the travel claim information, this time with the proper routing number. In all, the appellant stole $13,735.28 from the Air Force. However, because he resubmitted each travel claim, the appellant did not prevent his customers from receiving their travel reimbursements.

In sentencing the appellant, the military judge imposed a fine very close to the total amount of money the appellant had stolen. The appellant asked the convening authority for clemency with regard to the fine saying he had no way to pay the fine. The appellant asserted law enforcement officials had taken the items he had purchased with the stolen funds, so he could not sell them to obtain some money. He also stated he was unable to get a loan and his mother could not afford to help him.

In the addendum to the SJAR to the convening authority, the SJA responded to the appellant's comments with the following statement:

> A fine adjudged as part of a court-martial sentence is imposed for purposes of punishment; it is not designed to secure repayment of ill-gotten gains. Whatever money is remitted by an Accused in payment of a fine is deposited into the general treasury of the United States, as compared to the United States Air Force. Therefore, in deciding whether to approve the adjudged fine (and its related

[1] The adjudged sentence included two years of contingent confinement. The convening authority reduced this to six months in accordance with the pretrial agreement.

contingent confinement), you should view it solely as punishment, not recoupment of losses.

The appellant argues that this statement is inaccurate because the military judge may have imposed the fine for a number of reasons, *including* recoupment of losses. The appellant contends that because the SJA improperly advised the convening authority, new post-trial processing is in order. The appellant further claims that if he had been served with this statement, he would have responded, and his response may have influenced the convening authority's ultimate decision.

Addendum to SJAR

Before taking action on an accused's sentence, a convening authority is required to "obtain and consider the SJA's recommendation." *United States v. Catalani*, 46 M.J. 325, 326 (C.A.A.F. 1997) (quoting Article 60(d), UCMJ, 10 U.S.C. § 860(d); Rule for Courts-Martial (R.C.M.) 1106(a)). The accused and his counsel must be served with a copy of the recommendation. R.C.M. 1106(f)(1). The accused then has the opportunity to provide "corrections or rebuttal to any matter in the recommendation believed to be erroneous, inadequate, or misleading, and [the accused] may comment on any other matter." R.C.M. 1106(f)(4). After the accused responds to the SJAR, the SJA may provide the convening authority with an addendum to supplement the original recommendation. When an addendum includes new matter, "the accused and counsel must be served with the addendum." *Catalani*, 46 M.J. at 326 (citing R.C.M. 1106(f)(7)).

Although the definition of "new matter" is determined on a case-by-case basis, the term generally refers to material "from outside the record of trial[] and issues not previously discussed." *Catalani*, 46 M.J. at 326 (citing R.C.M. 1106(f)(7), Discussion). A response to a statement made by the accused does *not* constitute new matter, nor does discussion by the SJA "of the correctness of the initial defense comments on the recommendation." R.C.M. 1106(f)(7), Discussion. (emphasis added.). Once an appellant demonstrates that the SJA offered new matter in the addendum to the recommendation, the appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997) (quoting Article 59(a), UCMJ, 10 U.S.C. § 859(a)). An appellant who makes a "colorable showing of possible prejudice" is generally granted new post-trial processing. *Id.* at 324.

For the case currently under review, we are not convinced the SJA's statement constituted new matter. The statement was a response to a clemency submission by the appellant in which the appellant explained his financial hardship and inability to pay a fine. Because the statement was a response and did not constitute new matter, the SJA was not required to serve the addendum on the appellant or his counsel.

Even if the statement did constitute new matter, the appellant has not made a colorable showing of prejudice. The appellant has not shown how the SJA's comments hindered his request for clemency, nor has the appellant provided any indication that he would have responded to the addendum with information that had not previously been provided to the convening authority. The appellant has submitted an affidavit in which he offers a response that he claims he would have provided had he been served with the SJA's addendum. In the appellant's proffered response, he reasserts that he does not have the resources to pay a fine, just as he explained in his original clemency submission. Reasserting information from a clemency submission does not constitute a colorable showing of prejudice.

The appellant also states in his affidavit that his original clemency submission "should not be construed as an unsupported or improper attempt to obtain clemency." However, the SJA did not suggest in his addendum that the appellant submitted improper support for his clemency request. This assertion is not a valid response to the contested SJA statement. Overall, the proffered response was "insufficient to meet the defense burden of demonstrating that service of the Addendum on the defense could have produced a different result from the convening authority." *United States v. Frederickson*, 63 M.J. 55, 59 (C.A.A.F. 2006). Therefore, even if the SJA's statement in the addendum constituted new matter, the appellant has not made a colorable showing of prejudice, and new post-trial processing is not warranted.

Sentence Appropriateness

After being convicted of one count of larceny for taking over $13,000 from the Air Force, the appellant was sentenced to receive, inter alia, a dishonorable discharge. We find this portion of the appellant's sentence was inappropriately severe.

This Court may approve only so much of a sentence as we find correct in law and fact. We will not approve a sentence that is inappropriately severe. "Sentence appropriateness involves the judicial function of assuring that justice is done and that the accused gets the punishment he deserves. *United States v. Healy*, 26 M.J. 394, 395 (C.M.A. 1988). We evaluate the appropriateness of a sentence based on "individualized consideration of the particular accused on the basis of the nature and seriousness of the offense and the character of the offender." *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982) (quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (1959)). In evaluating sentence appropriateness, this court is "free to determine ... that a sentence which contains an unsuspended punitive discharge is not appropriate and so should not be affirmed." *Healy* 26 M.J. at 396.

Article 66(c), UCMJ, 10 U.S.C. § 866(c), provides that this Court "may affirm . . . the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved." In *Jackson v. Taylor*,

353 U.S. 569, 576-77 (1957), the Supreme Court considered the statute and its legislative history, and concluded it gave the (then) Boards of Review the power to review not only the legality of a sentence, but also whether it was appropriate. Our superior court has likewise concluded that the Courts of Criminal Appeals have the power to, "in the interests of justice, substantially lessen the rigor of a legal sentence." *United States v. Lanford*, 20 C.M.R. 87, 94 (C.M.A. 1955); *see also United States v. Tardif*, 57 M.J. 219, 223 (C.A.A.F. 2002).

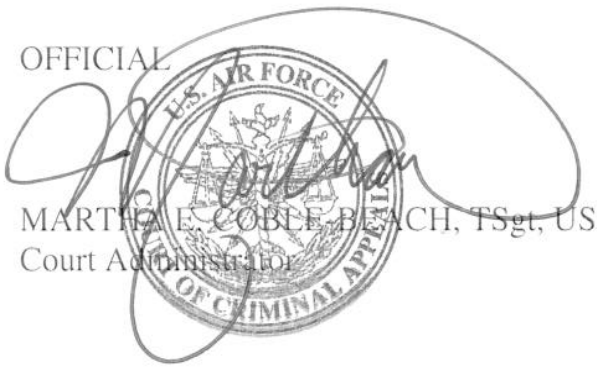
Based on the authority granted above, we approve only so much of the sentence as includes a bad-conduct discharge, confinement for 18 months, a fine of $13,736.00 with confinement for an additional six months, if the fine is not paid, forfeiture of all pay and allowances, reduction to the grade of E-1 and a reprimand.

Conclusion

The findings and the sentence as modified, 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 findings and the sentence, as modified, are

AFFIRMED.

OFFICIAL



MARTHA E. COBLE-BEACH, TSgt, USAF
Court Administrator