UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman RODERICK J. DAVIS
United States Air Force

ACM 35490

21 March 2005

Sentence adjudged 10 December 2002 by GCM convened at Cannon Air Force Base, New Mexico. Military Judge: Steven B. Thompson (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 27 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, and Major Andrew S. Williams.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel David N. Cooper, and Major Kevin P. Steins.

Before

PRATT, ORR, and MOODY
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

ORR, Senior Judge:

A military judge sitting alone as a general court-martial found the appellant guilty, in accordance with his pleas, of committing carnal knowledge, in violation of Article 120, UCMJ, 10 U.S.C. § 920, committing an indecent act upon a female under the age of 16, and contributing to the delinquency of three minors, in violation of Article 134, UCMJ, 10 U.S.C. § 934. The military judge sentenced the appellant to a dishonorable discharge, confinement for 30 months, and reduction to E-1. The convening authority subsequently reduced the confinement to 27 months.

The case is before this Court for review under Article 66, UCMJ, 10 U.S.C. § 866. The appellant asserts four errors for our consideration: (1) The appellant is entitled to pretrial confinement credit for the time he spent in civilian confinement; (2) The addendum to the staff judge advocate's recommendation (SJAR) contained "new matter" and should have been served on the appellant and his trial defense counsel; (3) The convening authority's action is ambiguous; and (4) The appellant's sentence is inappropriately severe.[1] For the reasons set out below, we find error, and return the case for a new action. Upon completion of the new action by the convening authority, this Court will consider the appellant's remaining assignment of error asserting that his sentence was inappropriately severe.

Pretrial Confinement Credit

During the sentencing portion of trial, the trial defense counsel asked the military judge to award the appellant pretrial confinement credit for the time he spent in civilian pretrial confinement for the same offenses of which he was convicted at his court-martial. The military judge never made a ruling on the request. On appeal, the government concedes that the appellant is entitled to seven days of credit and we agree. Because the appellant went into civilian pretrial confinement on 24 September 2001 and was released on 30 September 2001, he is entitled to day-for-day credit for each portion of a day he spent in pretrial confinement. *United States v. Allen*, 17 M.J. 126, 128 (C.M.A. 1984). *See also United States v. Sherman*, 56 M.J. 900, 901 (A.F. Ct. Crim. App. 2002). Accordingly, we order that the appellant receive seven days of credit against the confinement portion of his sentence.

Post-Trial Processing

As required by Article 60(d), UCMJ, 10 U.S.C. § 860(d), the staff judge advocate (SJA) prepared a formal recommendation for the convening authority, and served it upon the trial defense counsel for review and comment. The SJA recommended that the convening authority approve the sentence as adjudged. The appellant and his trial defense counsel submitted a request for clemency in accordance with Rule for Courts-Martial (R.C.M.) 1105, specifically asking that the convening authority reduce the appellant's confinement to 18 months. Additionally, the trial defense counsel asked the convening authority to disapprove the dishonorable discharge because an administrative discharge would serve the same objective.

Thereafter, the SJA prepared an addendum to the earlier recommendation, and advised the convening authority that he must consider the matters submitted by the defense. Additionally, the SJA advised the convening authority that if he considered matters outside the record of trial adverse to the appellant, the appellant must be notified

[1] This assignment of error is raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

and given an opportunity to respond. Once again, the SJA recommended that the convening authority approve the sentence as adjudged. The convening authority signed the indorsement to the addendum that stated, "I have reviewed and considered all matters presented before taking action on this case. The findings and sentence are approved as adjudged, *except I approve only twenty-seven (27) months of confinement*."[2] He subsequently signed an action that stated, in pertinent part, "only so much of the sentence as provides for 27 months confinement and reduction to the grade of E-1 is approved, and except for the dishonorable discharge, will be executed."

The appellant asserts that the addendum to the SJAR contains "new matter." Specifically, he argues that it was improper for the SJA to assert in the addendum that, "The victim has stated that she did not want the Accused to touch her or have sex with her." Because of this statement, the appellant avers that the SJA should have served both he and his trial defense counsel with a copy of the addendum. We disagree.

Our superior court has stated that the standard of review for determining whether the addendum to the SJAR contained new matter is 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)). R.C.M. 1106(f)(7) only requires service of an addendum if it contains new matter. In *Chatman*, the court held that even if there were new matter in an addendum to the SJAR, when the appellant complains about the SJA's failure to allow him an opportunity to respond, the appellant must "demonstrate prejudice by stating what, if anything would have been submitted to 'deny, counter, or explain' the new matter." *Chatman*, 46 M.J. at 323. *See also* Article 59(a), UCMJ, 10 U.S.C. § 859(a).

In the instant case, the addendum to the SJAR does not contain new matter. In fact, the statement in the addendum is directly attributable to the victim's stipulation of expected testimony, which reads:

> While sitting in the car, the accused reached over with his hand, stuck his hand down my pants, and began rubbing my pubic area with his hand. I did not want him to touch me. I tried to stop him, but he kept touching me.
>
> . . . .
>
> He locked the doors and rolled up the windows. He then pulled down my pants and got on top of me. He touched my pubic area with his penis, and he entered my vagina with his penis. I did not want to do this, and I told him "no," "to stop," and " to get off me."

[2] The italicized words were handwritten on the convening authority's indorsement.

Because the stipulation of expected testimony was entered into evidence as Prosecution Exhibit 18 and considered by the military judge, it is not new matter. *See* R.C.M. 1106(f)(7), Discussion.

Next, the appellant asserts that the convening authority's action is ambiguous. We agree. After reviewing the action, we find it is unclear what the convening authority intended to approve. The first portion of the language in the action suggests that the convening authority only intended to approve confinement for 27 months and reduction to E-1, not the dishonorable discharge that was adjudged. However, the convening authority's indorsement to the addendum, and the second phrase relating to the execution of the sentence, "except for the dishonorable discharge," suggests that the convening authority intended to approve the dishonorable discharge. Furthermore, the action provided that the appellant "will be required, under Article 76a, UCMJ, [10 U.S.C. § 876a] to take leave pending the completion of appellate review of the conviction," a requirement which would only be necessary if the dishonorable discharge was approved.

We conclude that the action of the convening authority is ambiguous. *See United States v. Vogle*, 53 M.J. 428 (C.A.A.F. 2000) (mem.); *United States v. McDaniel*, 21 C.M.R. 182, 185 (C.M.A. 1956). According to R.C.M. 1107(g), we may instruct a convening authority to withdraw an incomplete, ambiguous, or erroneous action and substitute a corrected action.

Conclusion

Accordingly, we return the record of trial to the Judge Advocate General for remand to the convening authority to withdraw the ambiguous action and substitute a corrected action and promulgating order. Thereafter, Article 66, UCMJ, shall apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court