UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

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**UNITED STATES**

**v.**

**Captain MICHAEL R. DAVIS**
**United States Air Force**

**ACM 37120**

**25 November 2008**

Sentence adjudged 08 June 2007 by GCM convened at Elmendorf Air Force Base, Alaska. Military Judge: Charles E. Wiedie, Jr.

Approved sentence: Dismissal, confinement for 254 days, restriction to the limits of Elmendorf Air Force Base, Alaska, and a prohibition from entering any establishment that sells alcoholic beverages for a period of 2 months.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Major Shannon A. Bennett, and Captain Michael A. Burnat.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Major Jeremy S. Weber, and Captain Ryan N. Hoback.

Before

BRAND, FRANCIS, and JACKSON
Appellate Military Judges

This opinion is subject to editorial correction before final release.

PER CURIAM:

In accordance with his pleas, the appellant was found guilty of four specifications of disobeying a lawful order,[1] two specifications of assault consummated by battery,[2] and one specification of communicating a threat, in violation of Articles 92, 128, and 134, UCMJ, 10 U.S.C. §§ 892, 928, 934. The adjudged sentence included a dismissal, confinement for nine months, and restriction to the limits of Elmendorf Air Force Base,

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[1] However, the convening authority disapproved the findings of one of the specifications, Specification 3 of Charge III.

[2] The military judge determined the specifications were multiplicious for sentencing purposes.

AK, and from [entering] any establishment that sells alcoholic beverages for two months.[3] The approved sentence limited confinement to 254 days and approved the rest of the sentence.

On appeal the appellant asserts two errors: (1) whether the Action of the convening authority should be set aside because the Staff Judge Advocate's Recommendation (SJAR) erroneously stated the maximum imposable sentence to confinement; and (2) whether appellant's sentence is inappropriately severe.[4]

*Background*

On Christmas night 2006, the appellant, his wife, and some friends played Texas Hold 'Em at the appellant's on-base residence. Over the course of the evening, the appellant drank a bottle of champagne and eight beers. The appellant decided to go for a walk at approximately 0100 on 26 December 2006. The card game then ended, and the victim (JD, the appellant's wife) got in their van and went looking for the appellant. During this time, JD received a number of calls from the appellant, including one where the appellant threatened to kill her. Upon returning home, JD saw the appellant in the vicinity of their driveway. He started shouting and hitting the van with his fist. Not getting anywhere, the appellant retrieved a snow shovel and smashed out the window on the van's sliding door. He grabbed JD, struck her in the neck, pulled her hair, grabbed her throat, and choked her. She was able to get away from the appellant when he slipped on the ice, and she locked the van again. The appellant then broke out the window on the driver's door and hit JD on the arm with the snow shovel. Prior to the physical altercation, JD called 911. As a result, police arrived, and the appellant was arrested.

Later in the day on 26 December, the appellant's commander gave him a no-contact order for JD, which the appellant promptly violated the next day when he was escorted to his house to get some belongings. While in the house, he left JD a note. He was given another no-contact order on 26 January 2007. On 29 January 2007, the appellant got drunk, and late that night, climbed in the kitchen window of his house (where he was no longer residing), and confronted his wife, apologizing.

*SJAR*

The appellant asserts the convening authority's Action must be set aside because the SJAR erroneously stated the imposable sentence for confinement. The SJAR stated the maximum imposable sentence could include up to nine years of confinement. This was incorrect. The maximum confinement time was limited to five and one-half years.

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[3] The word "entering" was added to the announced sentence in the Action. The appellant's counsel noted this in his submission but asserts no prejudicial error to appellant. Further, while trying to figure out if this was a legal sentence, the appellant waived any issues with the prohibition.

[4] Submitted pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).

The trial defense counsel submitted clemency matters on 18 August 2007, prior to receiving the SJAR, which was served on 6 September 2007. However, the defense counsel submitted additional matters on 2 October 2007. There was no objection to the SJAR or mention of the incorrect maximum imposable sentence to confinement. The defense and appellant's request was that the appellant's dismissal be suspended.

The appellant, because of a successful Article 13, UCMJ, 10 U.S.C. § 813, motion, was awarded 186 days of credit in addition to the 93 days he received for pretrial confinement.[5] Hence, after the trial the appellant did not return to confinement.

"The standard of review for determining whether post-trial processing was properly completed is de novo." *United States v. Sheffield*, 60 M.J. 591, 593 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). Failure to raise this issue in a timely manner waives it unless it is plain error. Rule for Courts-Martial 1106(f); *United States v. Scalo*, 60 M.J. 435, 436 (C.A.A.F. 2005).

Although the staff judge advocate was clearly mistaken when he misinformed the convening authority about the maximum confinement time, this is not an error that rises to the level requiring corrective action. *See generally United States v. Powell*, 49 M.J. 460 (C.A.A.F. 1998). The error may have been plain and obvious but there is absolutely no evidence that the appellant was prejudiced. *Scalo*, 60 M.J. at 436-37.

*Sentence Appropriateness*

We only affirm those sentences that we find are correct in law and fact. Article 66, UCMJ, 10 U.S.C. § 866(c). In doing so, we must consider the entire record, the character of the offender, and the nature and seriousness of the offense. In this area we exercise our judicial function to ensure justice was done. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988); *United States v. Snelling,* 14 M.J. 267, 268 (C.M.A. 1982).

After threatening to kill his wife, the appellant physically assaulted her in the driveway of their on-base quarters in the early morning hours after Christmas. In addition to using his hands and arms, he used a snow shovel. Thereafter, he received a no-contact order which he violated on three separate occasions, including sneaking into their on-base quarters through a window at night. After a careful review of the record of trial, to include the appellant's post-trial submissions, we conclude the appellant's sentence was not inappropriately severe.

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[5] We note the convening authority erred in not including the credit awarded as a result of illegal pre-trial punishment in the Action, as required by Rule for Court-Martial 1107(f)(4)(F). We find this to be harmless under the limited circumstances of this case, as the illegal pretrial confinement was discussed in both the SJAR and the submissions from the defense. Further, the appellant was not in jail after the conclusion of the trial. We do, however, remind the government of the requirement.

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