UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class MARK S. DENEGRE
United States Air Force

ACM 36031

18 April 2006

Sentence adjudged 29 June 2004 by GCM at Holloman Air Force Base, New Mexico. Military Judge: Barbara G. Brand (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Sandra K. Whittington, Major James M. Winner, and Captain Anthony D. Ortiz.

Appellate Counsel for the United States: Lieutenant Colonel Gary F. Spencer, Major John C. Johnson, and Major C. Taylor Smith.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

SMITH, Judge:

The appellant was convicted, contrary to his pleas, of wrongful use of cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the findings and sentence as adjudged.

The appellant asserts a single error on appeal: Whether the addendum to the staff judge advocate's recommendation (SJAR) contained "new matter" that was not provided to defense counsel for comment. We hold that the SJAR did contain "new matter" and return the case for new post-trial processing.

Background

In his post-trial clemency submission, the appellant and his trial defense counsel asked the convening authority not to approve the adjudged bad-conduct discharge (BCD). At trial, and in his post-trial submission, the appellant presented a number of mitigating personal circumstances to explain his drug use. Those circumstances were compelling enough to cause the convening authority's legal staff to consider recommending clemency, and prompted the staff judge advocate (SJA) to contact the trial defense counsel himself to see if the appellant would consider a change to the nature of the punishment imposed.[1] The appellant was not receptive to converting the adjudged BCD to a period of confinement.

An assistant SJA prepared the initial portion of the addendum to the SJAR and included the following recommendation:

> I have carefully considered the attached clemency matters. [The appellant] was convicted of wrongfully using cocaine on divers occasions. Although his conduct warrants his sentence of a [bad-conduct] discharge, confinement for two months and reduction to the grade of E-1, his medical providers could have done a better job of monitoring his prescription drug use. This fact led me to give serious consideration to his clemency request. *However, since [the appellant] was unwilling to consider proposed alternatives to a bad conduct discharge*, I recommend you approve his sentence as adjudged.

(Emphasis added.)

After listing out the attachments, including the appellant's clemency submission, the SJA then offered his separate recommendation:

> I have reviewed the record of trial, the matters submitted under RCM 1105, and the forgoing recommendations. In many respects, I found the request to commute the BCD to be persuasive. I found it particularly mitigating that [the appellant's] initial entry into drug usage may have been precipitated by a less th[a]n model drug regime prescribed by the base clinic. I also found his clemency statements, indicating a genuine acceptance of responsibility and commitment to drug rehabilitation, to be persuasive. Therefore, after my review of the clemency matters I queried

[1] *See* Rule for Courts-Martial (R.C.M.) 1107(d)(1). We are not suggesting in this opinion that the government cannot or should not discuss possible options with an accused's counsel. Problems arise when the SJA informs the convening authority about these discussions without notice to the defense.

> the defense counsel on whether [the appellant] would be prepared to serve additional confinement in lieu of his BCD. As the GCMCA [general court-martial convening authority] you are permitted to disapprove the BCD outright or to commute it to 12 months of confinement or any lesser period. Despite my query, I have seen no such offer from [the appellant]. *I took [the appellant's] failure to agree to serve any additional period of confinement in lieu of his BCD as an indication to me of a real lack of commitment to do whatever is necessary to remit his BCD.* Therefore, after careful consideration of all matters, I concur and recommend you approve the findings and sentence as adjudged.

(Emphasis added.)

Discussion

Whether comments in an addendum to an SJAR constitute "new matter" requiring service on the accused is a question of law to be reviewed 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)). "'New matter' includes discussion of the effect of new decisions on issues in the case, matter from outside the record of trial, and issues not previously discussed." R.C.M. 1106(f)(7), Discussion. "'New matter' does not ordinarily include any discussion by the staff judge advocate or legal officer of the correctness of the initial defense comments on the recommendation." *Id.* If a comment constitutes "new matter," and if the appellant "makes some colorable showing of possible prejudice," then he or she will be entitled to relief. *Chatman*, 46 M.J. at 323-24.

Appellate government counsel aver that "[n]othing in the Addendum can be considered new matter," despite also characterizing the SJA's comments as "includ[ing] *evidence* demonstrating that Appellant's desire to remain in the Air Force has finite boundaries" (emphasis added).

This is not a close call. For the first time, the SJA informed the convening authority about discussions with the appellant's trial defense counsel that were directly related to the sentence adjudged and under consideration by the convening authority. The one-sided recitation and interpretation of that discussion and its aftermath certainly were outside the record.[2] *See United States v. Komorous*, 33 M.J. 907, 910-11 (A.F.C.M.R.

[2] We are focusing on the SJA's comments, but the initial recommendation by the assistant SJA was improper as well. The representation that the appellant was "unwilling to consider proposed alternatives" was inexact, at best, and flatly misleading at worst. Even the SJA's comments reflect that the appellant and his counsel considered the SJA's overture – unwillingness to agree does not mean unwillingness to consider. That is more than semantic hairsplitting, since the assistant SJA's comment amounted to "new matter" (an unfavorable opinion on the appellant's rehabilitation potential). *See United States v. Anderson*, 53 M.J. 374, 377 (C.A.A.F. 2000).

1991) ("revealing new facts, even in rebuttal of the story urged in a defense submission, involves 'new matter'").

Having found that the SJA's comments amounted to "new matter," we next consider whether the appellant has made a colorable showing of possible prejudice. *See Chatman*, 46 M.J. at 323-24. To do that, the appellant must "demonstrate prejudice by stating what, if anything, would have been submitted to 'deny, counter, or explain' the new matter." *Id*. at 323 (citing Article 59(a), UCMJ, 10 U.S.C. § 859(a) (error must materially prejudice substantial rights of accused)). The threshold is low: "if an appellant makes some colorable showing of possible prejudice, we will give that appellant the benefit of the doubt and 'we will not speculate on what the convening authority might have done' if defense counsel had been given an opportunity to comment." *Chatman*, 46 M.J. at 323-24 (quoting *United States v. Jones*, 44 M.J. 242, 244 (1996)).

This case is unusual, in that we find a colorable showing of possible prejudice is established by the addendum comments alone. The general court-martial convening authority received advice from his senior legal advisor that presented one side of a post-trial negotiation regarding clemency. Appellate defense counsel submitted a declaration to us from the trial defense counsel that includes some details about the nature of the SJA's inquiry. The convening authority needed to know those details to put the appellant's decision about changing the punishment in context and allow the appellant to explain his position about serving additional jail time.[3]

The SJA found the appellant's clemency submission "persuasive," with "particularly mitigating" factors related to medical treatment the appellant received for a serious back injury. The convening authority may well have developed a similar view of the appellant's case. But, his SJA called into doubt the sincerity of the appellant's clemency request and personalized the legal advice by implying a personal affront at the appellant's failure to seize the opportunity offered to him.

In short, we find a colorable showing of possible prejudice. *See United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000). The appellant is entitled to new post-trial processing.

[3] We note the SJA drew negative conclusions about the appellant's "commitment to do whatever is necessary to remit his BCD," but the appellant did not represent to the convening authority that he would "do whatever is necessary" to avoid a BCD. In context, we interpret the appellant's request to "change" the BCD to be a plea for an administrative discharge instead of a punitive discharge, not more confinement time instead of the BCD.

Conclusion

The approved findings 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). The action of the convening authority is set aside. The record of trial is returned to The Judge Advocate General for remand to the convening authority for post-trial processing consistent with this opinion. Thereafter, Article 66(b), UCMJ, 10 U.S.C. § 866(b), will apply.

OFFICIAL

ANGELA M. BRICE
Clerk of Court