UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman ANTHONY J. DEVLIN
United States Air Force

ACM S31858

11 December 2012

Sentence adjudged 22 July 2010 by SPCM convened at Davis-Monthan Air Force Base, Arizona. Military Judge: David S. Castro (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 6 months, forfeiture of $964.00 pay per month for 6 months, and reduction to E-1.

Appellate Counsel for the Appellant: Colonel Eric N. Eklund; Lieutenant Colonel Gail E. Crawford; and Major Nathan A. White.

Appellate Counsel for the United States: Colonel Don M. Christensen; Lieutenant Colonel Linell A. Letendre; Major John E. Owen; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and HECKER
Appellate Military Judges

PER CURIAM:

In accordance with his pleas, the appellant was convicted at a special court-martial composed of a military judge of one specification of wrongfully using cocaine on divers occasions, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged sentence consisted of a bad-conduct discharge, confinement for 6 months, forfeitures of $1396.00 pay per month for 6 months, and reduction to the grade of E-1. The approved sentence consisted of a bad-conduct discharge, confinement for 6 months, forfeitures of $964.00 pay per month for 6 months, and reduction to the grade of E-1. One issue is raised for our consideration: whether the staff judge advocate improperly advised the convening authority by assuming a calculation error in the amount of forfeitures rather than advising

the convening authority to direct a post-trial Article 39(a), UCMJ, 10 U.S.C. § 839(a), session to clarify an invalidly adjudged sentence. Finding no error that materially prejudices a substantial right of the appellant, we affirm.[1]

Discussion

At the time of his court-martial, the appellant was a Senior Airman (E-4) and had served on active duty for three years and five months. His base pay in 2010 was $2,094.00 per month. As the sentencing authority, the military judge announced the following sentence: "Senior Airman Anthony J. Devlin, this court-martial sentences you to be reduced to the grade of E-1, to forfeit $1,396.00 of your pay per month for six months, to be confined for six months and to be discharged from the service with a bad conduct discharge." Defense counsel did not object to the adjudged sentence.

Forfeitures adjudged at a special court-martial may not exceed two-thirds pay per month for one year. Article 19, UCMJ, 10 U.S.C. § 819; Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(i). If a sentence includes both forfeiture of pay and reduction in grade, the maximum forfeiture is based on the grade to which an accused is reduced. R.C.M. 1003(b)(2). Because the appellant's sentence included a reduction in grade to E-1, his maximum forfeiture of pay was $964.00 per month.[2]

In his initial recommendation, the staff judge advocate advised the convening authority to approve the sentence as adjudged. Prior to the convening authority taking action, the staff judge advocate recognized the mistake and provided the convening authority with an addendum to his initial recommendation, informing him that the adjudged forfeitures were in error and recommending that he approve forfeitures of $964.00 per month for six months based on the appellant's reduction in grade. The defense counsel was served with the staff judge advocate's initial recommendation and did not comment on the issue of forfeitures. The convening authority approved forfeitures of $964.00 pay per month for six months.

The appellant now contends that he was subjected to "an ambiguous, uncertain sentence" because the improper forfeitures made it unclear whether the military judge

[1] Though not raised as an issue on appeal, we note that the overall delay of more than 540 days between the time this case was docketed with the Air Force Court of Criminal Appeals and completion of review by this Court is facially unreasonable. Because the delay is facially unreasonable, we examine the four factors set forth in *Barker v. Wingo*, 407 U.S. 514, 530 (1972): "(1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to timely review and appeal; and (4) prejudice." *United States v. Moreno*, 63 MJ. 129, 135–36 (C.A.A.F. 2006). When we assume error but are able to directly conclude that any error was harmless beyond a reasonable doubt, we do not need to engage in a separate analysis of each factor. *See United States v. Allison*, 63 M.J. 365, 370 (C.A.A.F. 2006). This approach is appropriate in the appellant's case. Having considered the totality of the circumstances and the entire record, we conclude that any denial of the appellant's right to speedy post-trial review and appeal was harmless beyond a reasonable doubt.

[2] In 2010, an E-1 with over three years of service received $1,447.00 in base pay per month.

intended to sentence the appellant to a reduction to the grade of E-1 but mistakenly calculated the forfeiture of pay based on the appellant's then grade of E-4, or the military judge misspoke when he announced the reduction in grade and instead intended that the appellant should remain an E-4 and forfeitures of two-thirds pay would occur at that pay grade.

In post-trial matters, "there is material prejudice to the substantial rights of an appellant if there is an error and the appellant 'makes some colorable showing of possible prejudice.'" *United States v. Wheelus*, 49 M.J. 283, 289 (C.A.A.F. 1998) (quoting *United States v. Chatman*, 46 M.J. 321, 323-24 (C.A.A.F. 1997)). We conclude the error in the initial recommendation was obvious, but we do not find a colorable showing of possible prejudice.

If we are confident that we can discern the extent of a trial error's effect on the sentencing authority's decision, we may adjust the sentence accordingly. *United States v. Reed*, 33 M.J. 98, 99 (C.M.A. 1991). Based on the record, we are convinced that the military judge intended to reduce the appellant to the lowest enlisted grade but mistakenly based his forfeitures on the appellant's then-existing grade. As the appellant was an E-4 at the time he was sentenced, if the military judge intended to simply adjudge forfeitures at that grade, he would not have announced as part of his sentence a reduction in grade. Given that the convening authority approved a legally permissible sentence, we find no material prejudice to the substantial rights of the appellant.

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

LAQUITTA J. SMITH
Paralegal Specialist