UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman Basic DONAVON F. FREDERICKSON[1]
United States Air Force

ACM 35442

30 June 2004

Sentence adjudged 18 September 2002 by GCM at Yokota Air Base, Japan. Military Judge: Dawn R. Eflein (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 22 months, forfeiture of all pay and allowances, a fine of $15,000.00, and to be further confined until such fine is paid, but not for more than an additional 8 months.

Appellate Counsel for Appellant: Major Terry L. McElyea, Major Rachel E. VanLandingham, Major Antony B. Kolenc, and Captain Diane M. Paskey.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Robert V. Combs, and Major Tracey L. Printer

Before

STONE, MOODY, and JOHNSON
Appellate Military Judges

OPINION OF THE COURT

STONE, Senior Judge:

In accordance with his pleas, the appellant was found guilty of one specification of conspiring to open and steal mail matter, one specification of unlawful entry with the intent to open and steal mail matter, one specification of wrongfully opening mail matter,

[1] The appellant's name is spelled in various ways throughout the record of trial: Donovan K. Frederickson, Donavon F. Frederickson, Donovan F. Frederickson, and Donavon K. Frederickson. On the record, the appellant told the military judge his legal name is Donavon K. Fredrickson, but acknowledged that his military records all reflect Donavon F. Frederickson.

and four specifications of wrongfully opening and stealing mail matter, violations of Articles 81, 130, and 134, UCMJ, 10 U.S.C. §§ 881, 930, 934. The military judge, sitting alone as a general court-martial, sentenced the appellant to a dishonorable discharge, confinement for 22 months, total forfeitures, a $15,000 fine, and additional confinement of up to 8 months if the fine was not paid. The convening authority approved the findings and sentence as adjudged.

Before this Court, the appellant raises two issues: (1) whether his sentence is inappropriately severe; and (2) whether the addendum to the staff judge advocate's (SJA) post-trial recommendation contained prejudicial "new matter" that warrants corrective action. We find no error and affirm.

Sentence Appropriateness

The appellant was a member of the Air Postal Squadron at Yokota Air Base, Japan. In August 2001, he and a co-worker entered into an agreement to open packages and steal mail from the Aerial Mail Terminal (AMT) where they worked. Between August and December of 2001, the appellant and his co-worker unlawfully entered the AMT after duty hours in order to effect their agreement. They did this on a number of occasions and took property valued at approximately $15,000. They took, inter alia, jewelry, DVDs, video and digital cameras, video games, and electronic equipment. One specification involved a paint gun addressed to the base outdoor recreation office. But most of the property was to be delivered to the Base Exchange for resale, while the remainder was addressed to active duty and civilian employees. Upon investigation and a subsequent search, most of these items were found in the co-conspirator's dormitory room. The remainder was found in the appellant's room.

The appellant argues that imposition of a $15,000 fine is inappropriately severe because there was no evidence the appellant was unjustly enriched. In support of this argument he notes that the Discussion to Rule for Courts-Martial (R.C.M.) 1003(b)(3) suggests that a "fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted." He further notes that there was no evidence adduced at trial to show that he or his co-conspirator pawned or otherwise exchanged the merchandise they stole. Rather, he notes, most of the property was recovered.

But it has long been recognized that a fine is a legal punishment in any case in which an accused has been found guilty by a court-martial, even in the absence of unjust enrichment. The use of the term "normally" in the Discussion to R.C.M. 1003(b)(3) implies "there would be cases in which a fine would be adjudged even though unjust enrichment of the accused was not present." *United States v. Cuen*, 26 C.M.R. 112, 117 n.5 (C.M.A. 1958). *See also United States v. Olson*, 25 M.J. 293, 298 (C.M.A. 1987) ("unjust enrichment is not a legal requirement for a fine") (dicta); *United States v. Czeck*,

28 M.J. 563 (N.M.C.M.R. 1989) (non-mandatory guidance found in the Discussion to R.C.M. 1001(b)(3) does not render a fine per se inappropriate in the absence of unjust enrichment); *United States v. Robertson*, 27 M.J. 741, 743 (A.C.M.R. 1988) (the President, in promulgating R.C.M. 1003(b)(3), has not "placed any limitation on the circumstances in which a fine might be lawfully imposed").

Additionally, we note that the appellant's pretrial agreement does not discuss or limit the imposition of a fine. And finally, before accepting the appellant's pleas, the military judge asked the appellant and counsel for both sides if they understood that the maximum possible punishment included the possibility of a fine:

> MJ: Okay. Airman Frederickson, the maximum punishment in this case, based solely on your guilty plea is confinement for 35 years, total forfeiture of all pay and allowances and a dishonorable discharge. A fine may also be adjudged. What that means, is that it's possible in this case, if a total forfeiture and a fine were adjudged, basically that would be two separate elements, so you could be adjudged both a total forfeiture and a fine. Do you understand that?
>
> ACC: Yes, Ma'am.
>
> MJ: And on your plea of guilty alone this court could sentence you to the maximum punishment, which I just stated. Do you understand that?
>
> ACC: Yes, Ma'am.

Having determined there is no legal bar to the imposition of a fine in this case, even in the absence of unjust enrichment, we now must consider the appropriateness of the sentence. In doing so, we exercise our "highly discretionary" powers to assure that justice is done and that the appellant receives the punishment he deserves. Performing this function does not authorize this Court to exercise clemency. *United States v. Lacy*, 50 M.J. 286, 287 (C.A.A.F. 1999); *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988). The primary manner in which we discharge this responsibility is to give "individualized consideration" to an appellant "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). Among other factors, we will of course consider whether there is evidence of unjust enrichment or any other good reason for a fine.

As to the nature and seriousness of the appellant's offenses, we recognize they are indeed quite serious. The impact on the military community was substantial. He entered into a conspiracy to steal mail for the purpose of financial gain. In doing so, he deprived the rightful owners of the use and enjoyment of their property for a lengthy period. His actions negatively affected morale among service members serving overseas.

(Upon hearing of the investigation of the AMT, many mail patrons questioned the integrity of the military overseas mail system.) For the overseas military community, the appellant violated the trust they expect of those who hold positions within the postal squadron. As to the appellant's character, we note the record reflects that the appellant had a number of disciplinary problems, the most serious of which involved an aggravated hit and run accident. Applying the legal standard stated above to the facts of this case, we find that the appellant's sentence is not inappropriately severe.

Post-trial Processing

The appellant next contends that he was denied his right to a proper post-trial review of his case. Specifically, he asserts that he was not given an opportunity to review and comment on the addendum to the staff judge advocate's recommendation (SJAR) prior to its submission to the convening authority. He argues these comments contained new matter. We find no error.

In the appellant's post-trial clemency submissions, he focused on attaining relief from the dishonorable discharge and the $15,000 fine. He argued that a dishonorable discharge should be reserved for more serious offenses and suggested a bad-conduct discharge was more appropriate under the circumstances of this case. As to the fine, he speculated that the military judge imposed a fine based upon the belief that the appellant had been unjustly enriched. He argued he had not been unjustly enriched and pointed out to the convening authority that most of the stolen property was found in his co-conspirator's dormitory room. He further noted that there was no evidence the items had been pawned, and argued he had not personally profited from the thefts.

In response, the SJA prepared an addendum, carefully summarizing the appellant's post-trial submissions and attaching the entire clemency package. The SJA also responded to the appellant's submissions, and it is this paragraph that the appellant now argues included "new matters." Specifically, the appellant and his trial defense counsel provided declarations to this Court taking issue with the following language from the addendum:

> It's unfortunate the accused didn't take the time to consider the likely consequences of his misconduct when he was in a position to limit his damage. . . . Issuance of a [dishonorable discharge] isn't limited to cases of violence as the accused and his counsel contend; rather . . . the circumstances of each case . . . determine whether an accused should be separated from the service under conditions of dishonor after committing a serious offense (or offenses). . . . In arguing the accused didn't profit from his crimes because he didn't turn the items he stole into cash before he was caught . . . defense counsel ignores the fact the accused had the benefit of valuable property he didn't pay for; property that had a value of

> approximately $15,000. Therefore, there is a clear nexus between the fine the accused received and the crimes he committed. While it appears the accused's family may lend him their financial support to once again bail him out of a situation of his own making, that shouldn't dissuade you from approving what is an otherwise appropriate consequence of the accused's misconduct. Not approving the adjudged fine would give the accused a windfall he doesn't deserve.

If an addendum does not contain new matter, it need not be served upon the defense. "When new matter is introduced after the accused and counsel for the accused have examined the recommendation, however, the accused and counsel for the accused must be served with the new matter and given 10 days from service of the addendum in which to submit comments." R.C.M. 1106(f)(7).

The non-binding Discussion following R.C.M. 1106(f)(7) defines "new matter." It states:

> "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. "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.

Whether a comment in an addendum to an SJAR is "new matter" that must be served on an accused is a question of law reviewed de novo. *United States v. Key*, 57 M.J. 246, 248 (C.A.A.F. 2002); *United States v. Chatman*, 46 M.J. 321, 323 (C.A.A.F. 1997). An SJA's discussion of the correctness of the defense comments on the SJAR does not constitute "new matter." *United States v. Gilbreath*, 57 M.J. 57, 60 (C.A.A.F. 2002); *United States v. Jones*, 44 M.J. 242, 243 (C.A.A.F. 1996); *United States v. Leal*, 44 M.J. 235, 238 (C.A.A.F. 1996). *See United States v. Clark*, 22 M.J. 708 (A.C.M.R. 1986) (not "new matter" when it has its genesis in submissions by the accused or defense counsel).

Where "new matter" improperly comes before the convening authority, the appellant must demonstrate prejudice by stating what, if anything, would have been submitted to "deny, counter, or explain" the challenged material. *Chatman*, 46 M.J. at 323. If the "new matter" is neutral or trivial, the error may not result in prejudice. Article 59(a), UCMJ, 10 U.S.C. § 859(a); *United States v. Buller*, 46 M.J. 467, 468-69 (C.A.A.F. 1997). The threshold for this showing is low—the appellant need only make "some colorable showing of possible prejudice." *Chatman*, 46 M.J. at 324. A new action is not required where the appellant does not provide a possible response that "could have produced a different result." *United States v. Brown*, 54 M.J. 289, 293 (C.A.A.F. 2000).

We hold that the SJA's comments were not new matter. Most of the comments merely responded to the correctness of the appellant's post-trial claims. Indeed, the appellant's and trial defense counsel's declarations reflecting how they would have responded to the SJA's comments, if given the opportunity, merely reiterate the arguments previously made in their initial submissions—arguments which were carefully summarized in the addendum. Moreover, the SJA's comment that it was "unfortunate the accused didn't take the time to consider the likely consequence of his misconduct when he was in a position to limit his damage," is a "statement of the obvious" and not new matter. *See Key*, 57 M.J. at 249. It is also patently obvious that there is a nexus between the $15,000 fine and the $15,000 estimated value of the property that was stolen, and thus that comment would not be considered "new matter." Finally, the appellant has not established a colorable showing of prejudice regarding the SJA's comment that not "approving the adjudged fine would give the accused a windfall he doesn't deserve." Taken out of context, this comment suggests the appellant profited monetarily from the stolen goods. The SJAR, however, taken as a whole, makes it abundantly clear the convening authority was advised that the appellant had not pawned the stolen items and that the lion's share of the stolen items were recovered in the co-conspirator's dormitory room.

We note, finally, that this opinion is not an endorsement of the tone and the method employed here. This Court has observed that the dividing line between what is and what is not new matter can be wafer thin. *United States v. Haynes*, 28 M.J. 881, 882 (A.F.C.M.R. 1989). As our superior court noted, "Unnecessary appellate litigation can be avoided if SJAs liberally construe the term 'new matter.'" *Leal*, 44 M.J. at 237. If there is any doubt, the SJA is wise to err on the side of caution.

The SJAR is the government's opportunity to comment on the case and to provide the information necessary for the convening authority to make an informed decision. If the defense submissions require the government to discuss "new matter" to respond adequately, the addendum must be served on the defense for review and comment. If the defense submissions do not require "new matter" in the addenda, then a second lengthy discussion of the case is unnecessary. As our superior court observed, "SJAs control the process. They can avoid multiple addenda and defense responses by limiting their responses to 'a statement of agreement or disagreement with the matter raised by the accused[,]' without reciting additional facts or legal arguments." *Id*. It is often better for the addendum to contain a simple statement of agreement or disagreement. *See* R.C.M. 1106(d)(4). However, that is not strictly required. For the reasons discussed above, we find no error in this case.

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

FELECIA M. BUTLER, TSgt, USAF
Chief Court Administrator