UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman JOSE F. GARCIA
United States Air Force

ACM S30099

5 December 2003

Sentence adjudged 21 February 2002 by SPCM convened at Moody Air Force Base, Georgia. Military Judge: Gregory P. Holder (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 2 months, forfeiture of $737.00 pay per month for 2 months, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Beverly B. Knott, Major Terry L. McElyea, Major Jeffrey A. Vires, Major Karen L. Hecker, Captain Jennifer K. Martwick, and Captain James M. Winner.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Lance B. Sigmon, and Major John D. Douglas.

Before

BRESLIN, MOODY, and GRANT
Appellate Military Judges

OPINION OF THE COURT

MOODY, Judge:

The appellant was convicted, in accordance with his pleas, of one specification of false official statement and one specification of wrongful appropriation, in violation of Articles 107 and 121, UCMJ, 10 U.S.C. §§ 907, 921. A special court-martial, consisting of a military judge sitting alone, sentenced the appellant to a bad-conduct discharge, confinement for 2 months, forfeiture of $1,168.00 pay per month for two months, and reduction to E-1. The convening authority reduced the amount of forfeitures to $737.00 pay per month for two months but otherwise approved the sentence as adjudged. Additionally, the convening authority waived $1,096.00 pay per month for two months for the benefit of the appellant's dependents. The appellant submitted two assignments of

error: (1) That the action of the convening authority is ambiguous in that it does not modify, suspend, or disapprove adjudged forfeitures as a prerequisite to waiving mandatory forfeitures, contrary to *United States v. Emminizer*, 56 M.J. 441 (C.A.A.F. 2002); and (2) That the promulgating order is erroneous in that it incorrectly states that the appellant is subject to required DNA processing under 10 U.S.C. § 1565. We find error and order corrective action.

I. Background

The appellant was the treasurer of his squadron booster club. On several occasions during November 2001, he appropriated money belonging to the booster club and used it for his own personal reasons. The total amount of money he appropriated was $435.00, which he subsequently repaid. In addition, he stated to a master sergeant in his squadron that on one of these occasions he had withdrawn $230.00 from the booster club fund and had given it to a named individual for a squadron fundraiser. In fact, he had kept $30.00 of this money for his own personal use, and, therefore, his statement to the master sergeant was false.

The military judge sentenced the appellant to forfeiture of $1,168.00 pay per month for two months, which was two-thirds of the base pay of a senior airman (E-4). In advising the convening authority prior to action, the staff judge advocate's recommendation (SJAR) correctly noted that the amount of forfeiture should not have exceeded $737.00 pay per month, which reflected the proper calculation of forfeitures from the appellant's reduced grade of E-1. In addition, the defense counsel had requested on behalf of the appellant that the convening authority waive mandatory forfeitures in accordance with Article 58b, 10 U.S.C. § 858b. In commenting on this, the SJAR incorporated legal advice prepared by a judge advocate in the base legal office, which incorrectly stated the amount of mandatory forfeitures subject to waiver was $1,095.67. The action of the convening authority waived $1,096.00 pay per month for two months and directed this amount to be paid to the appellant's wife. This action is reflected in the special court-martial order, which also states at the top "DNA processing required. 10 U.S.C. § 1565."

II. Waiver of Forfeiture of Pay

This Court reviews post-trial processing de novo. The SJAR provided incorrect advice to the convening authority as to the proper amount subject to mandatory forfeitures. In the case of a special court-martial, such as that of the appellant, this amount is "two-thirds of all pay due that member" during the period of confinement. Article 58b(a)(1), UCMJ. This is different from the case of a general court-martial, in which mandatory forfeitures extend to "all pay and allowances due that member" during the period of confinement. *Id*. The SJAR mistakenly included allowances in calculating the amount of mandatory forfeitures in the appellant's special court-martial sentence.

Therefore, the advice about the amount of relief the convening authority could grant through waiver of forfeitures was erroneous.

Having found error, we must determine whether it materially prejudiced the appellant's substantial rights. Article 59(a), UCMJ, 10 U.S.C. § 859(a). In reviewing claims of an inaccurate or erroneous SJAR, this Court has held "there must not only be error, there must also be prejudice to the rights of the accused." *United States v. Blodgett*, 20 M.J. 756, 758 (A.F.C.M.R. 1985). The determination of whether an appellant was prejudiced by a mistake in the SJAR requires us to consider "whether the convening authority plausibly might have taken more favorable action had he or she been provided accurate or more complete information." *United States v. Alis*, 47 M.J. 817, 827 (A.F. Ct. Crim. App. 1998) (citing *United States v. Johnson*, 26 M.J. 686, 689 (A.C.M.R.), *aff'd*, 28 M.J. 452 (C.M.A. 1989)).

It is clear that the convening authority wanted to provide for the appellant's family. It is likely that, had the convening authority been properly advised, he would have waived the $737.00. Additionally, had he been properly advised, it is plausible that the convening authority might have elected further relief in some other form. For example, he might have reduced the period of confinement or he might have chosen not to approve the reduction in grade or to grant some other form of clemency. Therefore, we conclude that the error in the SJAR was prejudicial to the substantial rights of the appellant.

The action of the convening authority was incorrect in that he did not suspend, modify, or set aside the adjudged forfeitures, as required by *Emminizer*. This technical error, standing alone, would not be fatal, insofar as the convening authority's intention to provide for the appellant's dependents is sufficiently clear. *See United States v. Medina*, 59 M.J. 571 (A.F. Ct. Crim. App. 2003). However, considering this error in light of the other errors in post-trial processing, we conclude that corrective action is appropriate.

III. Required DNA Testing

DNA samples are required to be collected from any service member convicted of a "qualifying military offense." 10 U.S.C. § 1565(a). These offenses include a variety of violent crimes and sex offenses, but do not include wrongful appropriation or false official statement. Thus, the promulgating order contains erroneous language.

In light of the above, we conclude that new post-trial processing is required, which includes correct advice in accordance with Article 58b, UCMJ, and a resulting promulgating order with no reference to DNA processing.

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

HEATHER D. LABE
Clerk of Court