UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Senior Airman MARKUS A. GENTRY
United States Air Force

ACM S31361

30 October 2008

Sentence adjudged 28 June 2007 by SPCM convened at Francis E. Warren Air Force Base, Wyoming. Military Judge: Bryan D. Watson (sitting alone).

Approved sentence: Bad-conduct discharge, confinement for 5 months, and reduction to E-1.

Appellate Counsel for the Appellant: Lieutenant Colonel Mark R. Strickland, Lieutenant Colonel Maria A. Fried, and Captain Tiffany M. Wagner.

Appellate Counsel for the United States: Colonel Gerald R. Bruce, Lieutenant Colonel Matthew S. Ward, Major Brendon K. Tukey, and Major Steven R. Kaufman.

Before

FRANCIS, HEIMANN, and THOMPSON
Appellate Military Judges

OPINION OF THE COURT

THOMPSON, Judge:

Consistent with the appellant's pleas, a military judge sitting as a special court-martial convicted him of one charge and specification of divers wrongful uses of methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The adjudged and approved sentence consists of a bad-conduct discharge, confinement for five months and reduction to E-1. The appellant asserts that the convening authority abused his

discretion in denying the appellant's request for deferment and waiver of automatic forfeitures. We find to the contrary.

Background

The appellant was a minuteman munitions team member assigned to the Missile Maintenance Squadron at Francis E. Warren Air Force Base, Wyoming. The appellant's court-martial sentence of five months confinement and a bad-conduct discharge subjected the appellant to automatic forfeitures of two-thirds of his pay, beginning the earlier of fourteen days after the sentence was announced or the convening authority's action. Article 57, UCMJ, 10 U.S.C § 857. On 29 June 2007, the appellant's trial defense counsel submitted a request for deferral and waiver of the automatic forfeitures. The staff judge advocate recommended approval of the waiver. The convening authority denied the request on 10 July 2007. The convening authority's denial memorandum did not provide the rationale for his decision, as is required by Rule for Courts-Martial (R.C.M.) 1101(c). *United States v. Sloan*, 35 M.J. 4, 7 (C.M.A. 1982). On 23 July 2007, the staff judge advocate prepared the Staff Judge Advocate Recommendation (SJAR), which noted the earlier request for deferral and waiver, and the 10 July 2007 denial by the convening authority. On 27 July 2007, the trial defense counsel submitted a second request for waiver of the automatic forfeitures. On 2 August 2007, the trial defense counsel submitted clemency matters for the convening authority's consideration. On 13 August 2007, the staff judge advocate prepared an Addendum to the SJAR, informing the convening authority that the appellant was requesting waiver of the automatic forfeitures. The staff judge advocate listed the following as attachments: the clemency memorandum from the trial defense counsel; a memorandum from the appellant; the 27 July 2007 request for waiver of the automatic forfeitures; and eight pages of financial documentation provided by the appellant to explain the financial needs of the appellant's wife and child. The staff judge advocate recommended approval of the request for waiver of the automatic forfeitures for the benefit of the appellant's wife and child. On 13 August 2007, the convening authority signed a memorandum indicating he had reviewed all matters submitted in clemency and signed the Action. The Action was silent with respect to approval of the waiver of the automatic forfeitures. The convening authority approved the sentence as adjudged.

General Discussion of Deferment and Waiver of Automatic Forfeitures

If an adjudged sentence includes (1) death, (2) confinement for more than six months, or (3) confinement for six months or less and a punitive discharge, then automatic forfeitures of pay and/or allowances begin fourteen days after the sentence is adjudged or the date the convening authority takes action, whichever is earlier.[1] Article

[1] Automatic forfeitures consist of all pay and allowances for general courts-martial and two-thirds pay for special courts-martial. Article 58b, UCMJ, 10 U.S.C. § 858b.

57, UCMJ. Article 58b, UCMJ, provides that such automatic forfeitures may be deferred for the benefit of the appellant or waived for the benefit of appellant's dependents. Article 57, UCMJ; Article 58b, UCMJ. In the case at hand, the appellant's sentence falls within the provisions for automatic forfeiture of two-thirds pay, and he had two qualifying dependents at the time of his court-martial. Therefore, the rules with respect to both deferral and waiver of automatic forfeitures are applicable. The Rules for Courts-Martial discuss the requirements for both deferral and waiver of the automatic forfeitures of pay. R.C.M. 1101(c) and (d).

Denial of Request for Deferral of Automatic Forfeitures

For deferment of the automatic forfeitures, the accused has the burden of showing "that the interests of the accused and the community in deferral outweigh the community's interest in imposition of the punishment." R.C.M. 1101(c)(3). The Rule continues by outlining the factors the convening authority may consider when deciding whether to approve the deferral of automatic forfeitures. The factors include, but are not limited to" "the nature of the offenses . . . of which the accused was convicted; the sentence adjudged; . . . the effect of deferment on good order and discipline in the command; [and] the accused's character, mental condition, family situation and service record." *Id.* The convening authority's decision must be in writing with a copy provided the accused. *Id.* The decision of the convening authority is subjected to judicial review only for abuse of discretion. *Id.* The discussion to R.C.M. 1101 provides that the request and action on the request must be attached to the record and if denied, the basis for the denial should be in writing and attached to the record. R.C.M. 1101(c)(3), Discussion. Despite being in the non-binding discussion section of R.C.M. 1101, when a request for deferment is denied, our superior court has mandated the inclusion in the record of the convening authority's justification for such denial. *Sloan*, 35 M.J. at 7.

We review a convening authority's decision to deny a request for deferment of punishment under an abuse of discretion standard. R.C.M. 1101(c)(3). In applying this standard, this Court looks to whether the decision of the convening authority is within the prescribed boundaries or range of choices. *United States v. Siroky*, 44 M.J. 394, 399 n.1 (C.A.A.F. 1996). "To find an abuse of discretion requires more than a mere difference of opinion – the challenged ruling must be 'arbitrary, fanciful, clearly unreasonable,' or 'clearly erroneous.'" *United States v. McElhaney*, 54 M.J. 120, 132 (C.A.A.F. 2000) (citations omitted)).

In response to the appellant's initial request for deferral and waiver of automatic forfeitures, the convening authority denied the request without specifically outlining his reasons for such denial, as is required. In response to the appellant's assignment of error, the government submitted a signed, sworn affidavit from the convening authority, outlining his reasons for denying the request for deferral. In the affidavit, the convening authority writes:

1. My name is Colonel [M]. I am currently the commander of the 90th Space Wing, and was in that position when I reviewed [the appellant's] request for deferment of forfeitures resulting from his court-martial sentence.
2. I denied the repeated request for deferment for the following reasons: [The appellant] was convicted of wrongful use of methamphetamines. Members of the military who abuse drugs adversely affect the ability of the Air Force to maintain discipline, good order, and morale. I did not approve [the appellant's] request because I did not want to send the message that one could use drugs in the Air Force yet still benefit from the Air Force. As a result, I denied his request.

In similar circumstances, we have allowed the government to "enhance the 'paper trail'" to clarify post-trial processing issues. *United States v. Blanch*, 29 M.J. 672, 673 (A.F.C.M.R. 1989); *United States v. Garza*, 61 M.J. 799, 802-04 (Army Ct. Crim. App. 2005). We note the convening authority's justification for denial of the deferral of automatic forfeitures falls squarely within the boundaries set forth in R.C.M. 1101(c)(3). The convening authority's affidavit clearly states he considered the nature of the offenses of which the appellant was convicted and the effect of deferment on good order and discipline in his command. These are two of the suggested considerations outlined in R.C.M. 1101(c)(3). In our review of the entire record, we find the convening authority did not abuse his authority when he denied the deferral of automatic forfeitures in this case.

Denial of Request for Waiver of Automatic Forfeitures

The Rules for Courts-Martial outline different criteria for a convening authority's waiver of automatic forfeitures. Such waivers must be for the benefit of the accused's dependents. R.C.M. 1101(d)(1). The factors that "may be considered by the convening authority in determining the amount of forfeitures, if any, to be waived include, but are not limited to, the length of . . . confinement, the number and age(s) of the accused's family members, whether the accused requested the waiver, any debts owed by the accused, [and] the ability of the accused's family members to find employment . . . ." R.C.M. 1101(d)(2).

Unlike the Rule governing deferment of automatic forfeitures, the Rule governing waiver of automatic forfeitures does not direct that the convening authority's decision be subjected to judicial review for abuse of discretion. It also does not mandate that the convening authority's decision be in writing, served on the accused, be made a part of the record or contain a discussion of the rationale for any denial of waiver of forfeitures. *United States v. Zimmer*, 56 M.J. 869, 872 n.4 (Army Ct. Crim. App. 2002).

We concur with our sister service in *United States v. Quintin*, 47 M.J. 798 (N.M.C.C.A. 1998), that the authority to waive forfeitures given the convening authority under Article 58b, UCMJ, is an extension of his clemency powers under Article 60(c), 10 U.S.C. § 860(c). *Quintin*, 47 M.J. at 801. Clemency is within the convening authority's sole discretion. *Id.* The *Quintin* court noted there is no requirement for the convening authority to state the reasons for denying a request to waive the automatic forfeitures. *Id.* While a waiver may be approved at any time, it is normally part of the formal action of the convening authority. *United States v. Key*, 55 M.J. 537 (A.F. Ct. Crim. App. 2001). Finally, it is well settled that this court is not authorized to engage in exercises of clemency. *United States v. Healy*, 26 M.J. 394, 395-96 (C.M.A. 1988).

When error is raised with respect to the convening authority's exercise of clemency, this Court applies the standards set forth by our superior court in *United States v. Wheelus*, 49 M.J. 283 (C.A.A.F. 1998). In *Wheelus*, our superior court established the process for resolving claims of error connected with a convening authority's post-trial review. An appellant must allege prejudicial error and show what he would do to resolve the error if given such an opportunity. *Wheelus*, 49 M.J. at 288. Our superior court noted "[b]ecause clemency is a highly discretionary Executive function, 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." *Id.* at 289 (quotations omitted).

The appellant also asserts there was error when the convening authority did not approve the request for waiver of automatic forfeitures. Further, the appellant claims the denial materially prejudiced him in that his dependents did not receive the benefit of the waiver of automatic forfeitures. Applying the standards set forth in *Wheelus*, we find the appellant has not established error, let alone prejudicial error. *Wheelus*, 49 M.J. at 280.

Prior to submitting clemency matters, the appellant submitted a second request for waiver of the automatic forfeitures. The issue was clearly discussed in the SJAR Addendum and the request, with documentation, was included as an attachment to the Addendum. The convening authority was told in the Addendum that he must consider all matters submitted in clemency. The convening authority signed a memorandum indicating he reviewed all matters submitted in clemency prior to taking action in the case. There is no doubt the matters submitted by the appellant were in fact considered.[2] The convening authority was not required to separately advise the appellant of his decision to deny the request. His decision was set forth in his formal action when he did

[2] Additionally, review of the convening authority's affidavit submitted in support of his decision to deny the request for deferral of automatic forfeitures, clearly indicates the convening authority considered the request and made the decision to deny it. Although the convening authority uses the term "deferral" we note he also states "I denied the repeated requests for deferment." There was only one request for deferral of automatic forfeitures. The second request was simply a request for waiver of the automatic forfeitures. Therefore, although he did not include the word "waiver" in his affidavit, it is clear the convening authority considered, and denied, the appellant's second request.

not grant the request for waiver. As noted above, approval of requests for waiver of automatic forfeitures are usually formalized by the convening authority's action. The convening authority's exercise of his clemency powers was proper. Thus, we find no error.

Conclusion

The approved findings and sentence are correct in law and fact and no error prejudicial to the substantial rights of the appellant occurred.[3] 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 approved findings and sentence are

AFFIRMED.

OFFICIAL

STEVEN LUCAS, YA-02, DAF
Clerk of the Court

[3] We note the court-martial order contains one minor error in that it indicates "Charge I" when in fact there is only one charge. This error need not be corrected with a corrected order.