UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CAMERON S. GILOW
United States Air Force

ACM S32094

31 October 2013

Sentence adjudged 27 July 2012 by SPCM convened at Travis Air Force Base, California. Military Judge: W. Shane Cohen (sitting alone).

Approved Sentence: Bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand.

Appellate Counsel for the Appellant: Major Scott W. Medlyn.

Appellate Counsel for the United States: Colonel Don M. Christensen; Major Jason M. Kellhofer; and Gerald R. Bruce, Esquire.

Before

ROAN, MARKSTEINER, and WIEDIE
Appellate Military Judges

OPINION OF THE COURT

This opinion is subject to editorial correction before final release.

MARKSTEINER, Judge:

The appellant was convicted at a special court-martial, consistent with his pleas, by a military judge sitting alone of five specifications alleging unlawful use of marijuana, MDMA (also known as Ecstasy), Lortab, morphine, and hallucinogenic mushrooms, in violation of Article 112a, UCMJ, 10 U.S.C. § 812a, and with wrongfully using spice, in violation of Article 92, UCMJ, 10 U.S.C. § 892. He was sentenced to a bad-conduct discharge, confinement for 6 months, reduction to E-1, and a reprimand. On 18 September 2012, the convening authority deferred mandatory forfeitures for the benefit of the appellant's wife and child for a period of five months or until the appellant was

released from confinement, whichever occurred sooner, but otherwise approved the sentence as adjudged.

On appeal the appellant contends the convening authority's action should be set aside because neither the Staff Judge Advocate's Recommendation (SJAR) nor the Addendum to the SJAR advised the convening authority of the military judge's clemency recommendation. Additionally, the appellant argues his sentence is disproportionately severe by comparison to the sentence imposed on coconspirators in closely related cases. Finding no error, we affirm.

Background

The appellant, an aircraft mechanic assigned to Travis Air Force Base, California, used multiple drugs between November 2010 and May 2011. On 27 July 2012, in accordance with his pleas, the court found him guilty and sentenced him as reflected above. After announcement of sentence, the military judge went over the quantum portion of the pretrial agreement, noting that pursuant to the terms of the agreement the convening authority would approve no confinement in excess of six months. Immediately thereafter, the military judge noted:

> If the convening authority . . . chooses to do so and he is confident that the money will be used for the purpose of raising the child, then I recommend that . . . the automatic forfeitures be waived for the period of six months so that that money can be used for the raising of [the child]. But, if there is any inkling whatsoever that it will be used for marijuana or anything along those lines, then my recommendation does not include such an option.

On 2 August 2012, trial defense counsel submitted a request for deferment of the reduction in rank and waiver of forfeitures for the benefit of the appellant's unemployed wife and their three-year-old child. On 8 August 2012, the convening authority deferred mandatory forfeitures and reduction in rank until action. On 30 August 2012, trial defense counsel submitted, pursuant to Rules for Courts-Martial (R.C.M.) 1105 and 1107, the appellant's clemency petition, restating the request to waive automatic forfeitures, and also asking him to disapprove the adjudged punitive discharge. The petition requested the convening authority to "please consider the fact that the Military Judge did recommend on the record . . . that you waive the automatic forfeitures for the benefit of Mrs. Gilow and her son. He made this recommendation after considering all the facts presented by both the government and [the appellant] and after hearing testimony from Mrs. Gilow and an unsworn statement from" the appellant. Attached to the clemency petition were the appellant's 28 August 2012 personal clemency request and a letter from the appellant's wife, both of which echo the appellant's request for some relief from the financial burden of the adjudged sentence on his wife and child.

On 5 September 2013, the staff judge advocate submitted his Addendum to the SJAR to the convening authority. In the Addendum the staff judge advocate reported that he had "reviewed the attached clemency matters submitted by the defense and accused [referring to the appellant's submissions above]" but, like the original recommendation, mentioned neither the military judge's clemency recommendation nor the pretrial agreement.

On 18 September 2012, the convening authority waived the appellant's automatic forfeitures for five months or until his release from confinement, whichever occurred sooner, approving the remainder of the adjudged sentence.

Analysis

"[T]he staff judge advocate or legal advisor shall provide the convening authority with . . . a copy or summary of the pretrial agreement, if any; any recommendation for clemency by the sentencing authority, made in conjunction with the announced sentence; and the staff judge advocate's concise recommendation." R.C.M. 1106(d)(3).

We review de novo alleged errors in post-trial processing. *United States v. Sheffield*, 60 M.J. 591 (A.F. Ct. Crim. App. 2004) (citing *United States v. Kho*, 54 M.J. 63 (C.A.A.F. 2000)). The Court of Appeals for the Armed forces has established the following process for resolving claims of error connected to a convening authority's post-trial review: "First, an appellant must allege the error at the Court of Criminal Appeals. Second, an appellant must allege prejudice as a result of the error. Third, an appellant must show what he would do to resolve the error if given such an opportunity." *United States v. Wheelus*, 49 M.J. 283, 288 (C.A.A.F. 1998). "A recommendation by a military judge must be brought to the attention of the convening authority to assist him in considering the action to take on the sentence." *United States v. Lee*, 50 M.J. 296, 297 (C.A.A.F. 1999) (citing *United States v. Clear*, 34 M.J. 129 (C.M.A. 1992)).

The SJAR plainly omits two pieces of information required to be included: a summary of the pretrial agreement and reference to the sentencing authority's clemency recommendation. *Wheelus*, 49 M.J. 283; *Lee*, 50 M.J. 296. These omissions constitute plain and obvious error appropriately alleged under the first *Wheelus* factor.

Notwithstanding the plain and obvious errors, the appellant has failed to demonstrate prejudice under the second *Wheelus* factor. The signatures of both the staff judge advocate and the convening authority who acted in the appellant's case reflect their awareness of the pretrial agreement. Additionally, although the Addendum to the SJAR omitted mention of the military judge's clemency recommendation, such recommendation was included in the substance of the clemency petition (and attachments thereto) presented to the convening authority, which he verified he considered before taking action. Although the convening authority waived only five months of forfeitures,

as opposed to the six months the appellant requested, he did so specifically noting "[t]he two-thirds pay per month is directed to be paid to [Mrs.] Gilow, spouse of the accused, for the benefit of herself and the accused's dependent child," an outcome directly responsive to the appellant and his trial defense counsel's requests.

"A Court of Military Review is free to affirm when a defense allegation of legal error would not foreseeably have led to a favorable recommendation by the staff judge advocate or to corrective action by the convening authority." *United States v. Hill*, 27 M.J. 293, 298 (C.M.A. 1988). As we find no basis in the record to conclude that reference to the sentencing authority's clemency recommendation, or to the pretrial agreement in the staff judge advocate's post-trial correspondence with the convening authority, would have led to a more favorable outcome for the appellant, we find no error materially prejudicial to the appellant in regard to this assigned error.

We also find the appellant's second assigned error regarding sentence severity[*] to be without merit. *See United States v. Matias*, 25 M.J. 356, 361 (C.M.A. 1987) (noting no requirement to specifically address each assigned error so long as each error is considered).

Conclusion

The approved findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant occurred. Articles 59(a) and 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.

FOR THE COURT

STEVEN LUCAS
Clerk of the Court

[*] This issue was raised pursuant to *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982).